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In the
Supreme Court of the United States
OCTOBER TERM, 1977

NATIONAL COMMISSION ON EGG NUTRITION,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered November 29, 1977 and supplemented on January 23, 1978.

OPINIONS BELOW

After filing its complaint in this matter, the Federal Trade Commission sought and was denied a temporary injunction in the District Court pending the completion

of the administrative proceeding. The Court of Appeals reversed. 517 F2d 485 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976). The opinion of the District Court has not been reported officially but appears unofficially at 1975-1 CCH Tradecases ¶60,246 (N.D. Ill. 1974).

The decisions of the administrative law judge and the Federal Trade Commission on the merits are reported at 88 F.T.C. 84 (1976). The decision of the Seventh Circuit on appeal and the supplement thereto — the subjects of this petition — are officially reported at 570 F2d 157 (7th Cir. 1978).

JURISDICTION

The Court of Appeals rendered its judgment and opinion on November 29, 1977 and issued its supplemental opinion on January 23, 1978. On February 18, 1978, Mr. Justice Stevens extended the time in which petitioner might file a writ for a petition of certiorari to and including April 28, 1978. This petition is filed within the time allowed. Jurisdiction of the Court is invoked under 28 U.S.C. §1254(1). Jurisdiction of the Court of Appeals was based on §5(c) of the Federal Trade Commission Act, 15 U.S.C. §45(c).

QUESTIONS PRESENTED

(1) Whether the Court of Appeals abridged Petitioner's First Amendment rights and exceeded the remedial powers under the Federal Trade Commission Act: a) in forbidding all truthful, nondeceptive utterance on the important public controversy about dietary cholesterol and its possible relation to heart disease unless accompanied by judicially prescribed "corrective" statements; b) in mandating an additional statement which seeks

to present as true the government's opinion on the unsettled diet-heart disease controversy when a more neutral form of statement would remedy the evil found by the Commission; and c) in mandating the use of additional statements for "corrective" purposes for an unlimited period of time.

(2) Whether the Court of Appeals abridged Petitioner's First Amendment rights in failing to delineate: a) what speech must be accompanied by the forms of additional statements it has mandated and b) what speech may be uttered without any additional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Sections 5(a)(1) and (c) and 12 of the Federal Trade Commission Act, 15 USC §45(a)(1) and 52 are set forth in the Appendix.

STATEMENT OF THE CASE

Late in 1973 the National Commission on Egg Nutrition (NCEN),[1] a not-for-profit corporation formed by five members of the egg industry, published in the *New York Times* and the *Wall Street Journal* what the Federal Trade Commission (the Commission) found to be "the honestly-held views" of NCEN members, App. 5a, that

[1] This petition is also filed on behalf of Richard Weiner, Inc., a co-respondent in the proceeding before the Commission.

"there is no scientific evidence that eating eggs increases the risk of heart disease."[2] [3] The Commission challenged this and several ancillary statements in these publications under the Federal Trade Commission Act (the Act). An administrative proceeding followed in which the evidence showed a division among reputable scientists on the truth of NCEN's principal statement, NCEN's experts testifying that the data offered against eggs would "not convince anybody" that egg consumption was harmful to health. App. 15a. On appeal, the Commission found that "medical experts disagree" as to the relationship of diet to heart disease. App. 20a. It "expressed no view as to the merits" of the question, App. 38a, and declined "to determine . . . whose interpretation [of the research regarding eggs and heart disease] . . . is superior." App. 12a.

However, the Commission also found that NCEN's principal statement, expressed without qualification, might

[2] Hereafter referred to as NCEN's principal statement.

[3] Petitioner's publications do not raise the difficult remedial questions surrounding long repeated misleading advertising themes. See *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, ... U.S. ..... (1978). In this case Petitioner's principal statement appeared in three issues each of the *Wall Street Journal* and *New York Times* some four and one-half years ago and was repeated by others in a few local papers during the following six months. Aside from this, some point of purchase material, a booklet and a display board, used largely during the same period, the only repetition given Petitioner's principal statement has been in the publications shown in the appendix published in Chicago newspapers on January 9 and April 13 and 14, 1975. The law judge found these publications "may warrant First Amendment protection." App. 60a.

also be interpreted to deny the existence of studies from which qualified experts might reasonably hypothesize that eating eggs does in fact increase the risk of heart disease. App. 12a-13a, 17a-18a. The Commission concluded that such an interpretation of NCEN's principal statement would be false and misleading and hence a violation of the Act.[4] *Id.*

Notably, both the administrative law judge and the Commission failed to predicate liability on several post 1973 publications, found also to make NCEN's principal statement, in which NCEN variously criticized governmental action, App. 73a, 75a, reported the 1974 findings of a panel of British experts on the subject of eggs and heart disease, App. 71a-75a, and certain current research findings and opinions in the diet-heart disease field. *Id.* The law judge said these materials "may warrant First Amendment protection," App. 60a, and the Commission agreed, with the qualification that the materials are not necessarily non-commercial. App. 40a-41a.

In its order the Commission enjoined NCEN from making its principal statement when made unqualifiedly but permitted it if accomplished by a disclosure that:

> "many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease." App. 45a.

More generally, the order forbade any representation concerning the relationship between dietary cholesterol and heart disease unless accompanied by the same dis-

[4] The Commission further found that the challenged ancillary statements, most of which NCEN denied making but whose falsity was not contested, violated the Act.

closure. *Id.* Further, the order forbade any statement which represents as "insignificant" the available scientific evidence that dietary cholesterol including that in eggs may increase the risk of heart attack or misrepresents the "amount" of scientific evidence that eating eggs does not increase the risk of heart attack. *Id.* Finally, the order forbade the making of NCEN's ancillary statements. App. 43a-44a.

On appeal NCEN contended: (1) that the order was unconstitutionally overbroad in that it forbade not solely deceptive speech on eggs and heart disease but also a wide range of truthful utterance on the subject unless accompanied by governmentally mandated partisan statement not required to forestall deception or misleading connotation; and (2) that the order was unconstitutionally vague in failing adequately to delineate a) the circumstances under which NCEN's principal statement would be forbidden and, in light of the ruling of the law judge and the Commission on NCEN's post 1973 publications, App. 71a-75a, would not become a predicate for a finding of violation; and b) how, in the face of an admitted scientific controversy as to whether the data offered against eggs are significant at all, NCEN was to know when it was offending the injunction not to represent the "insignificance" of anti-egg evidence and not to misrepresent the "amount" of pro-egg evidence. To illustrate its contentions of overbreadth and vagueness of the order, NCEN attached to its appeal brief its most current publication (dated January, 1976, App. 76a-77a) and suggested that although it was plainly non-deceptive, without further definition in the order no reasonable man could determine whether it violated the order provisions.

In its November 29, 1977 decision the Court of Appeals addressed NCEN's contention that truthful, non-misleading speech cannot be burdened under the circumstances of this case by saying:

> "[T]he challenged condition on the right to make an assertion that is not deceptive does not meet [the constitutional test in that it] . . . would require NCEN to argue the other side of the controversy, thus interferring unnecessarily with the effective presentation of the pro-egg position". App. 62a-63a.

The court, however, then went on to prescribe a new form of additional statement for use with nondeceptive speech on the diet-heart subject, namely:

> "that there is a controversy among the experts and NCEN is presenting its side of that controversy." App. 63a.

The Commission-formulated statement was retained for speech commenting on "the state of the available evidence or information concerning the controversy." *Id.*

Only in its January 23, 1978 Supplemental Opinion, as NCEN continued to argue that on the record in this case truthful, non-misleading speech could not constitutionally be conditioned on the making of *any* added message, did the court intimate the basis for the order overbreadth challenged by NCEN:

> "we are entitled to *assume* that . . . enough taint [from NCEN's conduct] remains to justify . . . corrective advertising". App. 64a.

The Court acknowledged it was making this assumption even though the Commission had made no finding or suggestion whatever regarding any continuing effect of NCEN's past statements with respect to future truthful statements. *Id.*

The Court found NCEN's vagueness contentions to be without merit and hence did not disturb the Commission order in this connection. App. 60a-62a. At the same time, however, the court declined to say whether NCEN's post-1973 publications are permissible under the order and declined to give any guidance as to how, by or from what NCEN was to determine what measure of significance the Court had in mind in prohibiting representations that evidence against eggs is "insignificant" or as to what "amount" the Court had in mind in forbidding misrepresentation of the "amount" of pro-egg evidence. The Court also gave no hint whether NCEN's January 1976 publication, App. 75a-77a, was forbidden or permitted under its order or how NCEN was reasonably to make that determination.

The Commission's order, as modified and enforced by the Court of Appeals in its January 23 Supplemental Opinion, is set out below in relevant part.[5]

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[5] Part B of the Court's order forbids any advertisement which:

"1. Represents that eating eggs does not increase the risk of heart attacks . . . or . . ."

"2. Makes any representation concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks. . ."

"unless it is clearly and conspicuously disclosed . . . there is a controversy among medical experts concerning the relationship of dietary cholesterol, including that in eggs, to heart disease, and that respondents are presenting their side of that controversy."

Part C of the Court's order forbids any advertisement which:

"1. Represents that there exists, or describes, scientific evidence which supports the theory that consumption of dietary cholesterol, including that in eggs, does not increase the risk of heart attacks. . ."

"2. Makes any representation concerning the state of the available evidence or information concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks. . ."

"unless it is clearly and conspicuously disclosed . . . that many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease."

Part D of the Court's order forbids any advertisement which:

"1. Represents as *insignificant* the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of heart attacks . . . or otherwise misrepresents the *amount* of scientific evidence that eating eggs does not increase the risk of heart attacks. . . ." App. 65a-68a.

REASONS FOR GRANTING THE WRIT

This case, one of first impression, presents the important federal question of concern to all commercial advertisers of whether under the teachings of *Virginia State Board of Pharmacy* v. *Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976) truthful, nonmisleading commercial speech on matters of genuine scientific controversy can be constitutionally conditioned on the making of government prescribed "corrective" statements when the record does not show and the Commission did not allege or establish that such corrective statements are necessary to prevent the speech in question from being deceptive or misleading. At issue is not merely Petitioner's right to express itself truthfully and without government interference on the cholesterol/heart disease con-

troversy, but the more general question of whether the important societal interests advanced by vigorous truthful expression in the mercantile world especially on matters of scientific importance can flourish if government is free to inhibit or forbid that expression without reasonable cause. Resolution of this issue by this court is also needed because there is a split between the Seventh Circuit in this case and the Third Circuit[6] regarding the First Amendment limitations on remedial orders of the Commission in light of *Virginia Board.*

This case also presents the important federal question, not heretofore decided by this court, of what degree of vagueness is constitutionally permissible in remedial orders of the Commission in light of *Virginia Board.*

I.

OVERBREADTH

While as a matter of statutory authority the Commission has wide discretion in fashioning orders, *FTC* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 392 (1965). this court has consistently stated that the Act authorizes only remedies designed to prevent future repetition of conduct found to be unlawful, *FTC* v. *Henry Broch & Co.,* 368 U.S. 360, 364 (1962); *FTC* v. *Ruberoid Co.,* 343 U.S. 470, 473 (1952) and that remedies must have a "reasonable relation" to the offending practice. *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 613 (1946). Under this construction, lower courts have repeatedly trimmed back Commission orders which are so broad as to outlaw legitimate speech

[6] *Beneficial Corp.* v. *FTC,* 542 F.2d 611 (3rd Cir. 1976), *cert. denied,* 430 U.S. 983 (1977).

or proscribe expression other than that which if continued would directly aid in continuing the violation found. *Spiegel, Inc.* v. *FTC,* 411 F 2d 481, 484-485 (7th Cir. 1969); *ITT Continental Baking Co., Inc.* v. *FTC,* 532 F 2d 207, 221-222 (2nd Cir. 1969); *National Dairy Products Corp.* v. *FTC,* 412 F 2d 605, 623-624 (7th Cir. 1969); *Grove Laboratories* v. *FTC,* 418 F 2d 489, 496-497 (5th Cir. 1969).

With the demise of the commercial speech exception to the First Amendment, the limitation on the Commission's remedial powers has engendered the requirement, as a matter of First Amendment concern, that the remedy for a violation of the Act be closely related to prevention of future violations and not needlessly restrict lawful utterance.

> "[D]oubtless the Commission's broad construction of its §5 remedial authority cannot survive the demise of the commercial speech exception to the first amendment . . .
>
> "The Commission, like any governmental agency, must start from the premise that any prior restraint is suspect, and that *a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception." Beneficial Corp. and Beneficial Managements Corp.* v. *FTC,* 542 F 2d 611, 619-620 (3rd Cir. 1976), *cert. denied,* 430 U.S. 983 (1977).

See also *Chrysler Corp.* v. *FTC,* 561 F 2d 357, 364 (D.C. Cir. 1977) in which the court deleted "sweeping prohibitions" which were "potentially limitless" and lacking in "rational justification". As a consequence the Commission's discretion in formulating remedies is more circumscribed today and courts now have a distinctly

heightened duty to assure that the remedy chosen does not exceed the constitutional limit.

A.

Petitioner's first overbreadth challenge, following directly from these principles, is that the First Amendment forbids corrective advertising where the "corrective" statement is not reasonably needed to prevent speech covered by the order from being deceptive or misleading.

Nothwithstanding that the Commission found only a few representations dealing with this immensely broad scientific topic to be misleading, Parts B and C of the order patently forbid *virtually all* discussion by Petitioner on the diet/heart disease controversy, *certainly all* discussion as to eggs and heart disease, unless accompanied by one of two additional statements ordered by the government. No question is raised here as to the power constitutionally to condition the utterance of these few representations or those reasonably related thereto upon the making of some appropriate additional statement without which they will mislead. *Virginia State Board of Pharmacy* v. *Virginia Consumer Council, Inc.*, 425 U.S. 748, 771-772, n.24 (1976); *Young* v. *American Mini Theaters*, 427 U.S. 50, 68 (1976); *Bates* v. *State Bar of Arizona*, . . . U.S. . . . 53 L Ed. 2d 810, 835-836 (1977); *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749 (D.C. Cir. 1977) *cert. denied*, . . . U.S. . . . (1978).

Parts B and C, however, reach far beyond the statements challenged by the Commission and needlessly sweep within their prohibition an almost unlimited variety of accurate, nondeceptive scientific discussion on the diet-heart disease

question. It is the restraint of such discussion, illustrated in the footnote,[7] which Petitioner challenges here.

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[7] Petitioner posed some of the following illustrations to the Court of Appeals:

(1) A researcher from the University of Missouri has recently disseminated an in-press report of an experiment accepted for publication in the American Journal of Clinical Nutrition in which whole fresh egg was added to the diet of 60 men for 12 weeks and thereafter excluded from their diets for the same period and in which a second group of 60 men ate no visible eggs for 12 weeks and thereafter for a similar period ate one egg daily. The report concludes:

> "The findings of this study suggest a high individual variability of response . . . There was a lack of significant association of change in sCHOL [serum cholesterol] with dietary intake of egg and of dietary CHOL itself. These results are relevant to changes in the national diet currently recommended to lower sCHOL and [serum triglycerides] of normal adults. The study suggests that the indiscriminate exclusion of eggs may prove to be a useless measure". Porter, M.W. et al. *Effect of Dietary egg on Serum Cholesterol and Triglycerides of Human Males.*

(2) A somewhat similar egg feeding experiment was recently reported in the literature. Slater, G et al. *Plasma Cholesterol and Triglycerides in Men with Added Eggs in the Diet*, Nutrition Reports International, Vol. 14, No. 3 (September 1976). The younger men in the study were thought to be in better than average health and of them the report states:

> "[I]t would appear that these healthy young men have mechanisms that can metabolize from 340 to 790 mg. of cholesterol per day over an eight week period without any effect on either the plasma cholesterol or triglyceride levels."

(3) Dr. Peter N. Herbert, Head, Section of Lipoprotein Structure Molecular Disease Branch. National Heart, Lung, and Blood Institute in late October, 1976 submitted to the Federal Trade Commission in

None of this requires any further disclosure, much less that required by the order, to assure that it will not mislead or deceive. On its face, each statement is literally true and devoid of any connotation which is or might be misleading. Yet because of the overbreadth of Parts B

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[7] (Continued)

connection with hearings on a proposed trade regulation rule a brief description of egg feeding experimentation with humans. He concluded:

> "These studies suggest that the total interdiction of egg yolks in diets of hypercholesterolemics—recommended by ourselves and others—is not appropriate."

(4) "Scientists disagee as to the extent to which a reduction in cholesterol consumption will affect levels of blood cholesterol".

(5) "Cholesterol, either from the diet or produced by the body, is one of the constituents of every cell including cells in the heart muscle."

(6) "Today, among some heart-research scientists, theory is developing that particles in the blood which carry cholesterol (as distinguished from the mere level of total cholesterol in the blood) may provide valuable information about the origins of heart disease."

(7) "Heart disease seems to be multifactorial in that many suspected factors may contribute to the problem."

(8) "Some evidence is emerging that, at least for some people, increases in dietary cholesterol do not necessarily translate into increases in serum cholesterol."

(9) "There is a bio-mechanism in man which regulates the body's syntheseis of cholesterol and increased dietary cholesterol seems to have some influence on the operation of that mechanism."

(10) "A number of studies by researchers learned in the field have suggested that the serum cholesterol elevating effect of dietary cholesterol is significantly less than that of some saturated fatty acids."

and C,[8] each is forbidden unless accompanied by a government dictated recitation.

The Court's sole justification for this plain overbreadth, seemingly added as an afterthought in the Court's January 23rd Supplemental Opinion, is a supposed need for corrective advertising:

> "The past cannot be totally ignored . . . Concrete evidence of past effects is likely to be difficult and expensive, if not impossible to obtain in most advertising cases. Even though such evidence is not present, the FTC is entitled to draw reasonable inferences as to the effects deceptive statements are likely to have had upon consumers. Although the weight we can give to these effects in the present case is limited by the absence of any findings by the FTC on the subject, we are at least entitled to *assume* that many persons interested in the egg-cholesterol question have read NCEN's advertisements, as it was intended they should, and that therefore enough taint remains to justify the limited *corrective advertising* order we have approved." App. 64a.

Corrective advertising, however, would be constitutionally offensive here for several reasons. First, the record contains no evidence[9] whatever that there is a lingering

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[8] See note 5, *supra*.

[9] In *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, ... U.S. ..... (1978), the only Court of Appeals decision to approve corrective advertising of the kind involved here, the Court stressed repeatedly that future ads would have an inherently deceptive tendency unless qualified and that support for this conclusion was established in the record: "The disclosure that Listerine does not relieve colds is essential information to correct a widely held, mistaken belief which was cultivated by petitioner's past advertising." 562 F.2d at 759. The order in *FTC* v. *Simeon Management Corp.*, 532 F.2d 708 (9th Circ. 1976) "was set aside because

consumer misimpression regarding the relation of dietary cholesterol to heart disease from petitioner's late 1973-early 1974 statements or that consumers seeing a truthful statement by Petitioner today, including truthful statements within Part B and C such as those illustrated, would form any incorrect belief or otherwise be misled. Compare *FTC* v. *Simeon Management Corp.*, 532 F 2d 708 (9th Cir. 1976) and *Warner-Lambert Co.* v. *FTC, supra.* Second, there is no reasonable basis within or dehors the record to support an "assumption"[10] that corrective dis-

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[9] (Continued)
there was no evidence that consumers seeing the advertisements formed an incorrect belief or were mislead. In short, there was nothing to correct. That is not this case." *Id.* "Here . . . it is the accumulated impact of past advertising that necessitates disclosure in future advertising." *Id.* at 761. "[T]he Commission adduced survey evidence. . . We find that the . . . survey data and the expert testimony there constitute substantial evidence in support of the need for corrective advertising in this case." *Id.* at 762-763. In the present case the opposite situation is presented. Not only was no evidence adduced that future truthful statements (other than those reasonably closely related to those challenged by the Commission) would mislead without some further cleansing disclosure, but the Commission never even pretended to venture a presumption that such was the case.

[10] It seems apparent that if restraint of truthful speech can be successfully justified on a unsupported "assumption" of the kind here made by the Court of Appeals, the protected status of truthful commercial speech declared in *Virginia Board* is minimal if it exists at all and the Third Circuit plainly erred in holding that "the Commission's broad construction of its §5 remedial authority cannot survive the demise of the commercial speech exception to the First Amendment." *Beneficial Corp.* v. *FTC*, 542 F.2d 611, 619-620 (3rd Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). In that case, a split in the circuits exists regarding the impact of *Virginia Board* on the remedial powers of the Commission and this provides an added reason for this court to grant the writ.

closures with truthful statements by Petitioner are needed to prevent mistaken pro-egg beliefs today. On the contrary, the court can take judicial notice that commercial misstatements and misleading health claims *against* dietary cholesterol and eggs crowd the market place daily, and that if anything *anti,* not pro-egg statements need deception-preventing disclosures.

The third reason that corrective advertising is impermissible here is that until the Court of Appeals' January 23, 1978 Supplemental Opinion, this was not a corrective advertising case, the government having consistently asserted that it was *not* seeking corrective relief, in Petitioner's judgment for the obvious reason that there was no basis for it. Indeed, although on each appeal in this case Petitioner has argued that the orders impermissibly proscribed much truthful, nondeceptive speech which could stand "clean" without further disclosure or statement, the government has never sought to justify such proscription on principles of corrective advertising. For the Court of Appeals now to make this a corrective advertising case by ordering and assaying to justify an extensive restraint of truthful speech on its "assumption" of continuing consumer misunderstanding, neither asserted nor found by the agency nor evidenced by the record, both exceeds the scope of that Court's reviewing authority, *FTC* v. *Sperry & Hutchinson Co;* 405 U.S. 233, 246-249 (1972); *NLRB* v. *Pipefitters,* 429 U.S. 507, 522 (1977); *SEC* v. *Chenery Corp.,* 318 U.S. 80 (1943), and offends the most elemental concepts of procedural fairness.

Since there is no basis for corrective advertising here, and in the absence of such a basis the prohibition of truthful, nonmisleading speech by Parts B and C of the Court of Appeals order cannot be justified, it follows that those

Parts exceed the remedial power granted under Section 5 of the Act and abridge petitioner's speech rights under the First Amendment. Hence they cannot stand.

B.

Petitioner's second overbreadth challenge is that the language of the additional statement mandated by Part C of the order, namely

> "many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart attack," App. 67a,

impermissibly and unnecessarily forces Petitioner to express an anti-egg position on the merits of the diet heart disease controversy.

It is one thing to require Petitioner, when expressing its principal statement or some other view found to be misleading unless accompanied by an additional disclosure, to state, along the lines of Part B, that the matter is controversial and that petitioner is merely expressing its opinion. See *Virginia Board, supra,* n.24. It is quite another thing, however, to require an additional statement which does not merely assure that the listener will understand Petitioner's assertions to be subject to substantial expert disagreement but goes on to represent that the point of view of Petitioner and the reputable experts upon whom it relies is incorrect. This latter approach is constitutionally intolerable not only because the remedy proposed is more "than is necessary for the elimination of the deception," *Beneficial Corp.* v. *FTC,* 542 F 2d 611, 620 (3rd Cir. 1976), *cert, denied,* 430 U.S.

983 (1977), but because it effectively restrains debate[11] on one[12] side of an admittedly unsettled scientific controversy

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[11] While it may be true that some restraints upon commercial speech will not undesirably inhibit expression in cases where the truth of the commercial message is easily verifiable and where the utterance of the advertisement is a necessary element of promotion of the product involved, *Virginia Board,* n.24; *Bates* v. *State Bar of Arizona, supra,* 53 Led.2d at 835-836, no one contends that the extent of chill a given remedial measure will have on legitimate commercial utterance is not pertinent to the constitutional inquiry. Here speech deals with highly controversial matters and the Commission was unable to find which viewpoint, as to these controversial matters, is correct. App. 12a, 38a, 41a. Moreover, the speaker here is not directly engaged in product promotion. Under such circumstances, the prospect of Petitioner (or any other commercial speaker) having unvoluntarily to espouse the government's side of the controversy in future truthful discussion, as the additional statement in Part C requires, will surely chill even the boldest commercial speaker on a matter of current debate. In such a chilling ambiance, even the strong hearted will avoid speaking to the controversy, even though substantial new scientific information of undeniable public interest on eggs and heart disease becomes available for report. A measure of the chill of legitimate speech by the the partisan disclaimer (and order vagueness, *infra* 21-27) in this case is the fact that Petitioner has been constrained from publishing in the media for some twenty seven months by the prospect of a remedial disclaimer which would force it to argue and give credence to a side of the controversy it and its experts believe is scientifically in error. The depth of this chill adds force to Petitioner's argument that the Part C additional statement exceeds the constitutional limit.

[12] The Part C statement is not only partisan in that it inappropriately takes a position on the merits on one side of the diet-heart disease controversy but it places petitioner at a most unfair disadvantage, *cf. Chrysler Corp.* v. *FTC,* 561 F 2d 357, 364

(in its findings of fact the Commission declined to even say whose view was "more authoritative" App. 41a) contrary to established First Amendment protection for debate where views differ, *cf Wooley* v. *Maynard*, 430 U.S. 705, 714-717 (1977); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256-257 (1974); *Board of Education* v. *Barnette*, 319 U.S. 624, 633-634 (1943) and because it improperly requires Petitioner to utter an opinion it believes to be false. *U.S.* v. *National Society of Professional Engineers*, 555 F 2d 978 (D.C. Cir.), *cert. granted*, ... U.S. ..... (1977). Significantly, nothing in the record suggests that legitimate regulatory concerns regarding petitioner's discussion of the diet heart disease question cannot be entirely satisfied by an additional statement, where appropriate, along the lines of Part B.

Indeed, the Court of Appeals nowhere explains why the Part B disclosure is in any way inadequate or how the Part C disclosure can be constitutionally compelled in light of its express finding that:

> "The condition in its present form [i.e. as required by Part C] would require NCEN to argue the other side of the controversy, thus interferring unnecessarily with the effective presentation of the pro-egg position. The desired preventive effect can be achieved by requiring the disclosure that there is a controversy among the experts and NCEN is presenting its side of that controversy." App. 62a-63a.

It follows that the partisan language of Part C of the order cannot be sustained on the record of this case.

C.

Petitioner's last overbreadth challenge is that even if the additional statements challenged here could be required in connection with truthful utterance to serve some limited corrective purpose, the requirement as drawn is manifestly unreasonable in that it is not limited as to time or in any other manner. Apparently the court also "assumes" that the lingering misimpression which it "assumes" has been created by Petitioner's statements in late 1973 and early 1974 will continue indefinitely.[13] Without substantial support in the record for such an unrestricted assumption, it cannot be denied that the additional statement requirements of Parts B and C of the order are far more than necessary to cure the evil at hand and hence unconstitutional as well as beyond Section 5 power. *Beneficial Corp.* v. *FTC*, *supra*.

II.

VAGUENESS

There is no doubt that constitutionally permissible restraints on speech must be drawn with narrow specificity so that those affected may know with reasonable certainty what speech is being proscribed while not being forced to avoid protected speech for fear of violating proper orders. *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589, 603-604 (1967). The prohibitions in Commission orders must therefore be sufficiently "clear and precise" so as "to avoid raising serious questions as to their mean-

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[12] (Continued)
(D.C. Cir. 1977), since the Commission continues a broad tolerance of anti-cholesterol advertising. The Part C statement thus seems far better suited to shield anti-cholesterol advertisers from challenge, to drive Petitioner from the cholesterol debate on the expectation that it will forego publishing protected speech rather than make the odious disclosure, and to implant in the public mind the message in the partisan disclosure than to prevent deception.

[13] See note 3 *supra*.

ing and application." *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965).

The Court of Appeals' order is fatally imprecise in three respects:

A.

First, the court's decision fails to resolve the question whether Petitioner is free in the context of publications such as App. 71a-78a to make its principal statement and to report new research on the diet-heart controversy without government restraint.

In January and April, 1975 and in January, 1976, Petitioner published in the news media the results of certain new research and scientific opinion favorable to eggs. App. 71a-78a. Three of these publications were found by the Commission to make Petitioner's principal statement. In its first consideration of this material (except the 1976 piece) the Court of Appeals stated enigmatically that it was granting Petitioner's motion to incorporate such material into the record

> "because we are framing the temporary injunction, and the recent advertising bears on the nature of the provisions that should be included in that injunction." *FTC* v. *National Commission on Egg Nutrition*, 517 F.2d 485, 490 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976).

Petitioner believed the Court was thereby indicating that publications such as the newly incorporated copy would not be enjoined. The administrative law judge said somewhat more directly that the materials in question "may warrant First Amendment protection," App. 60a, and accordingly declined to predicate liability upon them. Again Petitioner took this as approval of the mode of presentation represented in these materials. The Commis-

sion said nothing inconsistent with the law judge's position, instead declaring that these materials "do not form the basis of our finding of liability." App. 40a. The Court of Appeals in its November 29th decision observed that the Commission had eliminated any confusion about the administrative law judge's statement by stating:

> "[We] must reject the suggestion attributed to the Administrative Law Judge . . . that [the materials just described] are not necessarily commercial publications . . .
>
> * * *
>
> The fact that the message is conveyed by means of selected quotations from the works of scientists and popular writers does not alter the *commercial* character of the publication" (App. 60a).

The issue, however, is not solely whether the publications in question are commercial, for it is now established that speech is not unprotected merely because it is commercial. *Virginia Board.* Assuming these materials to be commercial, the question remains as to whether they are protected. It is this question the Court has not clearly answered.

If these materials as presented are protected, Petitioner has an unrestrainable right to publish them, and newer data, in the same format. The failure of the Court of Appeals' order clearly to state what circumstances will give rise to First Amendment protection and which will not can only deter Petitioner from protected expression such as publishing the late 1977 official position of the Canadian government[14] on the relationship of eggs to heart disease. If

[14] "Evidence is mounting that dietary cholesterol may not be important to the great majority of people . . . Thus, a diet restricted in cholesterol would not be necessary to the general population." (App. 77a-81a).

publishing of such a statement is not protected, only a forthright judicial holding to that effect will cure the vagueness from which the order suffers.[15]

B.

The Court of Appeals order is also intolerably vague in that supposedly distinct classes of utterances which must be accompanied by one or the other of the two forms of additional statement[16] in Parts B and C of the order are so overlapping as to be nearly synonymous. As a result virtually every publication requiring the "controversy among medical experts" statement would also require the partisan "many medical experts believe" statement.

For example, what "representation concerning the relationship between eggs and heart disease" (which under Part B would be enjoined unless accompanied by the "controversy among experts" disclosure) cannot be said, directly if not indirectly, also to be a representation concerning "information" about the relationship of eggs to heart disease or concerning the "state of available evidence about the relationship of eggs to heart disease" (which, under Part C of the order, must be accompanied by the "many medical experts believe" recitation)? Certainly it cannot be constitutionally permissible to force petitioner at risk of penalty to second guess the Commission as to which disclosure is required. And yet that is undeniably what the order does.

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[15] The fact that Petitioner can request clarification from the Commission under 16 C.F.R. §3.61(d), App. 61a, does not justify abridgement of its First Amendment rights. In any event, Petitioner has already presented the publications in question to the Commission only to receive the enigmatic rulings described above.

[16] See note 5 *supra*.

C.

Petitioner's last vagueness challenge relates to Part D of the Court of Appeals' order which forbids advertising which

> "represents as *insignificant* the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant conditions."

or which

> "otherwise misrepresents the *amount* of scientfic evidence that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition". App. 68a.

Once again the order puts Petitioner in an impossible position. Without revealing what significance is the scientifically "true" significance of existing data or what amount is the scientifically "correct" amount, or how, by or from what the "true" significance or "correct" amount is to be determined, the order bars representations that certain evidence is "insignificant" and representations that misstate the "amount" of certain other evidence. Since this entire litigation concerns conflicting data evaluations by equally reputable experts, in short, discussion of a present scientific controversy which the Commission admittedly cannot resolve, App. 12a, 20a, 38a, 40a, this provision in the order gives Petitioner no measure at all of what is being forbidden or, conversely, of what may be said.

Is it not true that the significance of data supporting the government's position is rendered increasingly less reliable as more research such as the Porter, Slater, and Herbert work alluded to earlier, App. 12a, 20a, 38a, 40a, reach the public? Is the Commission prepared or equipped

to characterize the "significance" or "amount" of evidence contained in this ever changing data base? How is Petitioner to know what mode of expression is forbidden? Does Petitioner's January 29, 1976 publication (App. 75a-77a) violate these order provisions? Whose view, evaluation, quantification, interpretation of the "amount" of evidence will the Commission suffer Petitioner to state? If scientists cannot agree on this, how is Petitioner to know what evaluation is acceptable under this order? Is Petitioner to be held in violation of the order because it espouses the British Panel's view of "no evidence" App. 71a? Or Dr. Bernard Bellow's view that there is "no authoritative proof" that cholesterol in a balanced diet causes heart disease" (RX 6 B)[17]? Or Dr. William Kannel's view that there is no confirmed efficacy in lowering blood lipids (RX 30A)? Or Dr. George Mann's belief that the American Heart Association's evidence on the diet heart question is "puny" (RX 140 N.2)? Or the NIH's stark conclusion that:

> "[I]t is not known whether dietary manipulation has any effect whatsoever on coronary heart disease" (RX 72K).

Or the respected Dr. Michael DeBakey's opinion that "in normal individuals, there is no evidence that eating eggs can cause heart attacks?" (Chicago Sun-Times, Living Section, p. 3, Jan. 25, 1976) Or the expert opinions of Petitioner's own trial witnesses that *no evidence* exists that eggs increase the risk of heart attacks? And what is Petitioner permitted to do under the order with the Canadian Department of National Health and Welfare's October, 1977 statement questioning the supposed case

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[17] "RX" refers to exhibits introduced by Petitioner in the proceeding before the law judge.

against eggs? Supra, note 14. Obviously, without further definition in the order no reasonable man can determine whether the foregoing representations, if quoted by Petitioner, expressed as Petitioner's own views, or disseminated in their original published form "by courtesy of Petitioner", would violate the order although it would appear that much if not all this material is protected.

Indeed it is hard to imagine how the line thus drawn by the order "between the permitted and prohibited activities" could be more ambiguous or how such a line could ever be thought to satisfy the "standards of permissible . . . vagueness [which] are strict in the area of free expression". *NAACP* v. *Button,* 371 U.S. 415, 432 (1963). As the order now stands, it places Petitioner in the dilemma of having to elect among: (1) unwilling adherence to government orthodoxy by disseminating the government dictated Part C statement; (2) complete avoidance of the cholesterol debate including protected expression which, but for the order provisions, could not be restrained; and, (3) honest, robust utterance at the risk of contempt and substantial civil penalties.

The exercise of First Amendment rights should not be fraught with the perils of *The Lady or the Tiger.*

CONCLUSION

For the reasons given, the writ of certiorari should issue.

Respectfully submitted,

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APPENDIX

IN THE MATTER OF
NATIONAL COMMISSION ON EGG NUTRITION, ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8987. Complaint, July 23, 1974—Final Order, July 20, 1976

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

[1] Complaint in this matter was issued on July 23, 1974, charging respondents, the National Commission on Egg Nutrition (NCEN) and its advertising agency, Richard Weiner, Inc., with violations of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) in connection with their dissemination of certain publications pertaining to eggs and heart disease. In particular, the complaint alleged that respondents had directly or indirectly made the following claims, all alleged to be deceptive: (1) there is absolutely no competent and reliable scientific evidence that eating eggs, even in quantity, increases the risk of heart attacks or heart disease; (2) there is overwhelming competent and reliable scientific evidence that eating eggs does not increase the risk of heart attacks; (3) there is competent and reliable scientific evidence that dietary cholesterol (cholesterol contained in food), including that in eggs, decreases the risk of heart disease; (4) there is competent and reliable scientific evidence that avoiding dietary cholesterol, including that in eggs, increases the risk of heart disease; (5) eating eggs does not increase the blood cholesterol level (cholesterol contained in a person's blood stream) in a normal person; (6) a person's blood cholesterol level is prevented from being [2] raised or lowered by dietary

cholesterol intake because (a) the human body increases its manufacture of cholesterol in an amount equal to a decrease in dietary cholesterol intake and (b) the human body eliminates the same amount of cholesterol as that eaten; and (7) dietary cholesterol, including that in eggs, is needed by the body for building sex hormones, for transmitting nerve impulses and for maintaining life in cells.

The complaint further alleged that respondents had violated the law by making certain representations while lacking a "reasonable basis" for so doing. These included the claims that (1) eating eggs does not increase the risk of heart attacks and heart disease; (2) dietary cholesterol, including that in eggs, decreases the risk of heart attacks and heart disease, and (3) avoiding dietary cholesterol, including that in eggs, increases the risk of heart disease.

Hearings were held before Administrative Law Judge (ALJ) Ernest Barnes, who rendered an initial decision sustaining the allegations of the complaint, and recommended entry of an order to cease and desist.

At the time it issued its complaint, the Commission also sought a temporary injunction against certain claims made by respondent, pending resolution of the administrative proceeding, pursuant to the provisions of 15 U.S. C. §53. The District Court for the Northern District of Illinois denied the Commission's request, (*Federal Trade Commission* v. *National Commission on Egg Nutrition*, 1975-1 CCH Tr. Cases, Par. 60, 246) but the Court of Appeals for the Seventh Circuit reversed and ordered the District Court to enter an injunction in a form specified by the Court of Appeals. (517 F.2d 485, May 1975, *rehearing denied*, June, 1975). The District Court duly entered the injunction. Respondents filed a petition with the Supreme Court for a writ of certiorari, which petition the Court denied. 426 U.S. — — (No. 75-405; June 7, 1976).

The instant matter is before the Commission on the appeal of respondents from the initial decision.

I. Jurisdiction

At the outset respondents contend that the Commission lacks jurisdiction over NCEN because it is not a "corporation" within the meaning of Section 4 of the Federal Trade Commission [3] Act, which defines a corporation for purposes of the Act as one "organized to carry on business for its own profit or that of its members." In *Community Blood Bank of Kansas City Area, Inc.* v. *FTC*, 405 F. 2d 1011 (8th Cir. 1969), it was held that while the Commission properly exercises jurisdiction over such nonprofit corporations as trade associations which carry on business for the sake of their members, it may not exercise jurisdiction over nonprofit corporations which are organized and actually engaged in business for purely charitable purposes. (405 F. 2d at 222) NCEN argues that it falls within the exemption recognized in the *Blood Bank* case because it is a nonprofit corporation formed for the eleemosynary purposes of facilitating research by its "Commissioners" and expression of their individual views on the "cholesterol issue."

The administrative law judge concluded that NCEN was organized to carry on business for the benefit of its "members," the egg industry, that its activities were of a character designed to redound to the industry's pecuniary well-being, and that consequently NCEN is a corporation within the contemplation of Section Four. (I. D.p.72)[1]

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[1] The following abbreviations are used herein:

I.D. —Initial Decision, Finding No.
I.D. p. —Initial Decision, Page No.
CX —Complaint Counsel's Exhibit No.
RX —Respondents' Exhibit No.
Tr. —Transcript of Testimony, Page No.
RB —Respondents' Appeal Brief to the Commission, Page No.
CB —Complaint Counsel's Answer Brief to the Commission, Page No.
RRB —Respondents' Reply Brief to the Commission, Page No.

As the law judge noted, NCEN was created by the egg industry, or segments thereof, in response to anti-cholesterol attacks on eggs which had resulted in steadily declining per capita egg consumption. (I.D. 2, CX 101 A,B) NCEN began operation in August 1971 (I.D. 3), its membership consisting of a small, self-perpetuating board of directors—Commissioners—who throughout these proceedings have been individuals with commercial interests in the egg industry. (I.D. 5, 13) From NCEN's inception five of its Commissioners were designated by each of five different egg industry trade associations, (I. D. 4, [4] CX 154d, 198B, 204a) whose commercial nature is clear (I.D. 5). Virtually all of NCEN's funding has been provided by commercial, egg-industry related organizations, (I.D. 15, CX 162A) in particular the American Egg Board, which furnished all of NCEN's staff, office space, and other assistance, and which received in advance of implementation itemized budgets of NCEN's operations. (I.D. 15) It further appears that member trade associations were intimately aware of NCEN's activities (CX 96-98, 105) and in at least certain documented instances NCEN Commissioners reported formally on NCEN's activities to their respective organizations and received organizational recommendations or instructions as to courses of action which NCEN should pursue. (I.D. 14, CX 199A, 200A, 198B).

Newspaper advertisements sponsored by NCEN, some bearing the notation "Number — in a series of messages from America's egg producers" (CX1), were directed to consumers, and touted the nutritive virtues of eggs as well as conveying the message that no increased risk of heart disease would result from egg consumption, even "in quantity". A more detailed recitation of NCEN's structure and relationship to the egg industry is contained in I.D. 1-6 and 12-18.

Respondents argue in their defense that the principal purpose of NCEN was "• • • To establish the true nutritional values of eggs, particularly in the light of the

adverse publicity concerning cholesterol" (CX 150A), and thereafter to disseminate the individual views of NCEN Commissioners to the American public. NCEN Commissioners at trial denied that they served as "representatives" of the commercial groups of which they were simultaneously members, or were in any other way influenced by these commercial groups in the dissemination of their claims about eggs. (I.D. 18)

This Commission has no reason to doubt that the representations of NCEN generally reflect the honestly-held views of its Commissioners.[2] Nevertheless, our credulity, like that of the administrative law judge, is heavily if not confiscatorily taxed by the suggestion that NCEN was established, financed, and operated for the sole, or even for the principal purpose of permitting several individuals to disseminate their opinions [5] to the American public. Rather, the evidence viewed as a whole preponderates overwhelmingly in favor of the conclusion that respondent NCEN is a corporation existing in substantial part for the pecuniary benefit of the egg industry, and is therefore, like the traditional trade associations which spawned and nurtured it, subject to Commission jurisdiction.

In reaching our conclusion we have looked to the evidence with respect to several facets of NCEN's operations: (1) *origin* (a response by the egg industry to economically harmful attacks on the safety of eggs); (2) *character of membership* (egg industry executives, initially chosen by trade associations); (3) *source of funding;* (4) *relationships with profit-oriented groups* (submission of budget to AEB; reporting to trade associations, and at least occasional instructions given by associations); (5) *nature of publications;* and (6) *stated purpose.* Except with respect to NCEN's officially stated purpose the record strongly suggests commercial goals and cha-

[2] We do believe, however, that respondents should have realized that certain of the statements used to convey NCEN's belief in the safety of eggs had the tendency and capacity to deceive, infra., pp. 7-28.

racter, Even as to NCEN's officially stated purpose, an early version of its Articles of Incorporation lists as one organizational objective "to promote the general interests of the egg industry." (CX 136B) In any event, official characterizations of purpose, some of which appear to have been changed in suspicious proximity to developments in this litigation (CB 28-29) can be given little weight in the face of contradictory evidence as to the circumstances in which an organization is formed and the manner in which it actually functions. Similarly, we must agree with the law judge's skeptical assessment of the NCEN Commissioners' testimony, insofar as that testimony is both internally inconsistent and contradicted by contemporaneous documentary evidence. See I.D. 18.

While respondents contend that the factors cited by the ALJ "neither alone nor taken together" support a finding of jurisdiction (RB 7), their argument is at best persuasive only as to the first half of their conclusion. Obviously a determination of whether Commission jurisdiction is properly asserted over a nonprofit corporation or an individual engaged in activity which has the effect of promoting a product requires analysis of a large number of possible indicia of commercial purpose.[3] The presence of one factor alone, such [6] as receipt of financial benefit from a commercial source that happens to favor the recipient's viewpoint may well be insufficient.

Clearly, however, this case presents far more than the example of an industry choosing to accord a measure of financial support to an otherwise unrelated third party whose views, when published, inure to the industry's benefit. Rather, respondent NCEN was founded and al-

[3] We do agree with respondents (RB 15) that the ALJ termed the "stark falsity" of their representations (I.D. p. 88) is not a relevant factor to be considered on the issue of jurisdiction, assuming *arguendo* that the ALJ considered it so to be.

most entirely funded by the egg industry, with the obvious expectation that it would help counteract economically damaging publicity. It is staffed by egg industry executives, originally required to be from specified egg industry trade associations and, predictably enough, its publications, whether they represent the "industry" viewpoint or not, are of a sort which, if believed, would encourage the consumption of eggs. While the assertion of particular viewpoints may not be a contractual prerequisite to NCEN's receipt of funds, it is reasonable to doubt that NCEN could continue to exist if its Commissioners were somehow to reach and publicize the conclusion that consumption of eggs in quantity may possibly increase the risk of heart disease, just as it is doubtful that any egg industry trade group would continue to exist if it ceased to promote the interests of those whose funds are its predominant source of support. We believe these considerations taken together warrant the conclusion that NCEN is a nonprofit corporation which exists in principal part for the benefit of the egg industry, and hence, is subject to Commission jurisdiction.

Respondents contend that whatever may have been NCEN's status at the time of the complaint, it has as of the present time amended its bylaws so as to state explicitly that NCEN Commissioners shall "serve solely as individuals and shall not, with respect to NCEN activities directly or indirectly serve as agents for, or otherwise represent any trade association, business or commercial enterprise". We find no reason in the record of this case to conclude that this change in the wording of the bylaws can in any significant respect alter the commercial character of NCEN, given its origin, the manner in which it has operated heretofore, and its continued domination by egg industry members, whether or not they are officially called egg industry "representatives" during that portion of the day they devote to the affairs of NCEN.

[7] This is simply not the case respondents seek to make it in which an organization engaged primarily in

the noncommercial activity of disseminating for their own sake its members' views on a subject of scientific importance incidentally performs a function valuable to commercial interects. On the contrary, the evidence most strongly suggests that NCEN is an organization created and operated to benefit the egg industry through the incidental medium of what is termed its Commissioners' expression of their personal viewpoints. If respondents' argument as to jurisdiction is to be accepted under these circumstances, there is no company or industry in the Nation which could not obtain a ready exemption from laws prohibiting deceptive advertising merely by agreeing to fund the efforts of a group of its members or employees who decide that they wish to establish their own "National Commission" to do research and publicize their honestly held beliefs in the virtues of the product they have spent a lifetime selling. We do not believe the arm of the law was meant to be avoided so easily as this.

"To defend the place of the egg in the American diet by every legal means" —as NCEN on one occasion characterized its goal (RX 139)—is, in sum, not an endeavor which entitles a group of egg industry executives funded by egg industry trade groups to a blanket exemption from the scrutiny of a statute designed to prevent the deceptive promotion of products, including eggs. Having concluded that jurisdiction over respondents is properly asserted, we shall proceed to review the allegedly deceptive representations challenged in this proceeding.[4]

[4] Respondents also argue that in addition to establishing jurisdiction generally over NCEN, the Commission must establish jurisdiction over each challenged publication. We take this point to be a variant of respondents' claim that their publications concerning the virtues of eggs are not commercial advertisements and are shielded from Commission scrutiny by the First Amendment, an argument we discuss in Part III of this opinion. Respondent Weiner does not challenge the ALJ's finding of jurisdiction as to it.

II. Challenged Representations

A. *"There is no evidence? ? ? ?"*

The principal representation challenged in this proceeding is respondents' claim, made with slight variations of wording in numerous instances, that there is absolutely no scientific evidence that eating eggs, even in quantity, increases the risk of heart attacks or heart disease. (I. D. 32) The administrative law judge concluded that this representation was false and misleading. (I.D. pp. 79-81)

[8] An evaluation of the law judge's determination requires some discussion of the state of medical opinion with respect to the relationship between "dietary cholesterol"[5] and "coronary heart disease."[6] A matter of such considerable complexity does not lend itself readily to simple formulations, and the statements made herein must be quialified in light of the far more extensive discussion of the underlying issues contained in the initial decision and in the record as a whole.

It is apparent from the record of this case that many well-qualified medical science experts subscribe, with varying degrees of conviction, to the view that ingestion of cholesterol and "saturated fats"[7] in the human diet is positively related to the incidence or risk of coronary heart disease, in the sense that, for many people, increased consumption of dietary cholesterol and saturated fats

[5] Cholesterol is a fat-like waxy alcohol, with a sturdy and durable ring chemical structure that cannot be broken down. (I.D. 57) "Dietary cholesterol" is that cholesterol contained in food. Cholesterol is also produced by the body.

[6] "Coronary heart disease" is generally defined as an affliction of the heart muscle and its functions due to inadequate blood supply to the heart. *See* I.D. 51-54.

[7] Saturated fats are described in I.D. 57. Fat is a nutrient, and saturated fats occur in certain foods of plant origin as well as in many foods of animal origin.

will result in an increased risk of heart disease, and decreased consumption will lower that risk. For case of reference we shall, like the ALJ, refer to this view as the "diet/heart disease" hypothesis, although this generic term obviously subsumes a wide variety of particular approaches.[8]

[9] Egg yolks are the major source of readily assimilated cholesterol in the American diet, with one yolk providing around one-third of average daily intake of approximately 600-800 mg. Egg yolk has substantially more cholesterol than any other commonly eaten food (I.D. 55), and contains roughly four grams of saturated fat. (I.D. 56)[9]

The diet/heart disease hypothesis proceeds from several underlying propositions. These are, in outline, that (1) the amount of dietary cholesterol and saturated fat

[8] For example, proponents of the diet/heart disease hypothesis differ among themselves with respect to the relative importance of reducing consumption of dietary cholesterol as opposed to saturated fat. Further, it should be observed that some experts believe that the presence or absence of various dietary constituents other than cholesterol and saturated fat may be related to the risk of heart disease. (Tr. 1378, 19-7) This proceeding does not deal with these views. Also, it is generally believed that coronary heart disease is multifactorial (I.D. 54), and those who advocate dietary modification as a means of lessening its likelihood of occurrence generally recommend other preventive measures as well, examples of which might include certain sorts of exercise and elimination of cigarette smoking.

[9] Average daily intake of fat in the American diet is over 100 grams. (Tr. 2039) While some who counsel a reduction in saturated fat intake would include limitation of egg consumption as a partial means of accomplishing this (e.g. Tr. 2157), eggs are primarily cited as a contributor to the risk of heart disease by virtue of their cholesterol content, which was the principal focus of the proceeding before the law judge.

in the diet directly affects the level of cholesterol in the bloodstream ("serum cholesterol" or "blood cholesterol") of many people; (2) higher levels of cholesterol in the bloodstream are statistically associated with higher levels of risk of coronary heart disease in sample populations; and (3) serum cholesterol is "causally implicated" in the formation of the atherosclerotic lesions (I.D. 51) which precipitate heart disease.[10]

The initial decision reviews at great length the results of a large body of clinical-pathological, experimental, and epidemiological studies upon which scientists have relied in formulating the propositions described in the preceding paragraph, and from there the diet/heart disease hypothesis itself. (I.D. 60-98) The ALJ concluded that:

> The studies discussed in Findings 60-98 *supra*, constitute competent and reliable scientific evidence. They were conducted using scientific methodologies, were performed by competent and highly regarded investigators, have been reported in recognized scientific journals after peer review, and have been generally accepted by experts in the field and by the scientific community. Moreover, reputable [10] governmental and private scientific organizations have reviewed the evidence and relied on it in making recommendations to the medical profession and to the public for the treatment and prevention of [coronary heart disease]. Finally, complaint counsel's own witnesses relied on the evidence to form expert opinions regarding the relationship of diet to [coronary heart disease] and as to the effect of adding an egg per

[10] In the words of the "Report of Inter-Society Commission for Heart Disease Resources," a causal relationship between serum cholesterol and heart disease is "biologically plausible in terms of reasonable pathogenetic mechanisms and concepts of multifactorial etiology relating apparent cause and disease. Alternative hypotheses to account for the associations do not fit the majority of observations to date." (CX 18-Z9)

day to the average American diet (Findings 100-105 *infra*). [I.D. 99]

Respondents do not deny that well-qualified experts have relied upon competent and reliable scientific studies in hypothesizing a relationship between dietary cholesterol and heart disease. Respondents argue, however, that these experts have improperly interpreted the existing studies, that such studies lend little or no support to the diet/heart disease hypothesis, and that the studies consequently do not rise to the level of "evidence that eating eggs will increase the risk of heart disease." In support of their position respondents cite the testimony of certain of their own experts who, when asked at trial whether in their opinion there is any evidence that eating eggs will cause or increase the risk of heart disease, responded in the negative. Respondents would have the Commission conclude from this that the question of whether there is evidence to incriminate eggs as a factor in the risk of heart disease is, like the question of whether eggs actually do increase the risk, a subject of heated controversy upon which the Commission can and should make no pronouncement.

It is certainly not the Commission's intention to determine in this proceeding whose interpretation of a difficult and incomplete body of scientific literature is superior. It is, however, the Commission's statutory duty to ensure that commercial advertisements intended to convince the public of the safety of a product are not deceptive, and that oversimplified expressions of opinion are not taken out of context and presented as fact in order to misrepresent the nature of a complex scientific issue and thereby promote misleadingly the consumption of eggs.

It is manifest that "scientific evidence" as the term is commonly understood, may exist in support of a proposition whose truth is contested or, for that matter, in support of a theory which is ultimately determined by

general agreement not to be true at all. "Scientific evidence for a proposition" as that phrase is reasonably understood, means precisely those competent and reliable scientific studies of the sort summarized by the ALJ which, in the view of a body of well-qualified experts would lend support to the proposition. To assert flatly and [11] without qualification that "there is no evidence for this hypothesis" if what one means is really that "we, along with one segment of the relevant expert community, do not believe that the existing evidence supports this hypothesis" is misleading in the extreme.

We have reviewed with care the testimony of those experts and sources cited by respondents. In rendering their testimony respondents' witnesses did not dispute the fact that many experts, in the exercise of reasonable, albeit disputed, scientific judgment, have relied upon a large body of scientific studies in formulating the diet /heart disease hypothesis. Respondents' sources appear to believe, however, that such studies provide so little warrant for the hypothesis that they should not be described as "evidence" for it.

Complaint counsel suggest that respondents' experts merely used "no evidence" in the sense of "no conclusive evidence" or "no direct experimental evidence." (For example, there appears to be no good study relating actual limitation of cholesterol intake by a sample group to a decline in expected incidence of heart disease.) Dr. Stare, who testified for complaint counsel, may have used "evidence" in the foregoing senses when he initially testified that he knew of no evidence "per se" that eggs increased the risk of heart disease. His testimony was subsequently qualified. (Tr. 1036ff) At least some of those witnesses who testified for respondents, however, appear to have used "no evidence" in the somewhat stronger sense described in the preceding paragraph. (Tr. 2051, 2140, 2150, 1485-86)

It seems fair to say, nevertheless, that the difference between the "evidence" and "no evidence" positions is

one of degree rather than of kind. As respondents' witness Dr. Oliver noted in prefacing his account of the "no evidence" statement of the British Advisory Panel[11], "evidence in this context would be an aggregate of probability * * *" (Tr. 2136) In Dr. Oliver's view, presumably, the existing research lends so little (if any) weight to the view that increased consumption of eggs will [12] increase the risk of heart disease that he cannot consider such research as "evidence" for the proposition. However, Dr. Oliver did acknowledge that reduction of serum cholesterol was one part of a regimen which might *in toto* reduce the risk of heart disease (Tr. 2125), and he also noted that he recommended a reduction in egg consumption for his patients as part of a plan to reduce saturated fat intake and thereby help reduce the risk of heart disease. (Tr. 2157) In common with other witnesses, Dr. Oliver further noted that his conclusions as to the potential harm from dietary cholesterol and as to the existence of evidence with respect thereto did not apply to those suffering from gross abnormalities in the metabolism of lipids, a small fraction of the population but nonetheless a substantial number of people. (Tr. 2140 -2144)

The testimony of Dr. Yudkin, like Dr. Oliver an eminently well-qualified medical expert, is similarly diffuse.

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[11] "In certain animal species a diet rich in cholesterol induces the appearance of arterial lesions which have some similarity to those seen in human subjects, and comparative studies of different human populations show that those which have a diet rich in cholesterol have a higher death rate from [coronary heart disease]. However, a diet rich in cholesterol is usually one which is rich also in saturated fatty acids. Most of the dietary cholesterol in western communities is derived from eggs, but we have found no evidence which relates the numbers of eggs consumed to a risk of [coronary heart disease.]" (RX 112; Report issued by Britain's Department of Health and Social Security.

Asked his understanding of the "no evidence" statement in the British Panel report (which he and Dr. Oliver helped prepare), Dr. Judkin replied:

> My understanding of this sentence is that I did not find that there was anything in the literature, either directly saying that a population's experience of heart disease goes parallel with the number of eggs consumed in that population—that is, that there is no direct evidence, nor was there indirect evidence that would be convincing that the consumption of eggs raises the concentration of blood cholesterol and that this rise in blood cholesterol would increase the chances of getting a heart attack. (Tr. 1428)

Asked to interpret the term "evidence" Dr. Yudkin responded:

> I would say that I would interpret this word as meaning that I could convince anybody, by showing them the same facts, to come to the same conclusion, that is if it were positive evidence, that the facts would demonstrate that the number of eggs does increase, the number of eggs consumed does increase the number of ischemic (coronary) heart disease. This I would consider evidence. Or conversely, and this is how I meant the negative here, that the information, the data I could provide, would not convince anybody that the number of eggs consumed does increase the risk of ischemic heart disease. (Tr. 1429)

[13] A later portion of Dr. Yudkin's direct testimony similarly reflects the fine line between "no evidence" and "the evidence does not persuade me":

> *Question.* * * * Based on the data, results of that research as evidenced by those reports, based further upon your own personal expertise, results of your own experimentation and study, debate, based on your contacts with your fellow scientists, medical doctors throughout the world, I ask you, do you have an opinion, based upon a reasonable degree of med-

ical certainty, whether or not there is any evidence that eating eggs causes [coronary heart disease]?

Answer. No.

Q. The answer to my question is yes or no, do you have an opinion?

A. Yes, I have an opinion.

Q. And what is that opinion?

A. That all these studies were taken into consideration by me and my fellow members of this Panel when we wrote that report in which we said we did not have, there is not sufficient evidence to say that eating eggs causes heart disease.

Q. And do you have an opinion as to whether or not based on that same factual presentation, whether or not there is scientific evidence that eating eggs increases the risk of [coronary heart disease]? You can answer that question yes or no, do you have an opinion?

A. Yes.

Q. And what is that opinion?

A. My opinion is that this evidence does not demonstrate that eating eggs increases the risk of heart disease. (Tr. 1444-45)

A similar theme emerges in the following exchange on recross examination between Dr. Yudkin and complaint counsel: [14]

Q. Doctor, just to pick up again on the point raised by Mr. Fox on his redirect, the studies, the line of studies which we have been talking about which you assumed in your hypothetical when you say that these studies are not evidence as to the cause of heart disease, do you mean that they do not conclusively establish the cause, or that they are not evidence in support of the hypothesis or theory that dietary cholesterol is related to and serum cholesterol and saturated fat is related to the increased risk of heart disease?

A. This is a little bit like asking me whether I have stopped beating my mother, because I wanted to say something slightly different. I think that the

information as you asked me, by excluding other possibilities, gave me no opportunity than to say other than they are a part of the evidence. But I would say, for instance, that the seven countries study ["Coronary Heart Disease in Seven Countries," CX 76] can be used not only as evidence towards establishing the hypothesis that dietary fat or dietary cholesterol, as the case may be, may be involved in causing heart disease but equally could be used to support the hypothesis that dietary sucrose and several other factors between the seven countries and the level of cholesterol is just as great as with others.

Q. Could a competent scientist, including yourself as a competent scientist * * * use those studies to say that these studies constitute evidence supporting the theory that the factor, in your case dietary sucrose, is related to or contributes to the development of heart disease?

A. Yes. If it is understood that in order to establish the hypothesis one would need not only this but lots of other sorts of evidence. (Tr. 1488-89)

[15] In the context of their testimony, subject as it was to extensive qualification of the sort described in the preceding pages, we do not dispute respondents' experts' use of the term "no evidence" to characterize the evidence relied upon by proponents of the diet/heart disease hypothesis. It is an entirely different matter, however, for respondents to make the claim "no evidence" in a setting totally devoid of any mention of the substantial scientific controversy, the extensive scientific literature, and the fact that many well-qualified scientists believe that such literature incriminates dietary cholesterol, including that in eggs, as a contributor to the risk of heart disease.

Respondents argue, in essence, that the claim "there is no evidence" should be treated, and would be recognized by readers merely as a statement of opinion, *i.e.*, "in our opinion and that of certain experts on whom we

rely, the existing scientific studies pertaining to dietary cholesterol, eggs and heart disease lend no support to the hypothesis that eating eggs increases the risk of heart disease." Unfortunately, however, the phrase "there is no evidence" is also, and perhaps more reasonably subject to the interpretation that "there do not exist competent and reliable scientific studies from which well-qualified experts could reasonably hypothesize that eating eggs increases the risk of heart disease." This latter message is patently false and misleading.

It is well established, and critical to the notion of preventing false advertising, that where an advertisement conveys more than one meaning, one of which is false, the advertiser is liable for the misleading variation. *Murray Space Shoe Corp.* v. *FTC,* 304 F. 2d 270, 272 (2d Cir. 1963); *Rhodes Pharmacal Co.* v. *Federal Trade Commission,* 208 F. 2d 383, 387 (7th Cir. 1953), modified by restating the Commission's order, 348 U.S. 940 (1953). Nor does our application of that principle in this instance rest upon some mere semantic quibble or strained interpretation of words, since that meaning of respondents' claim which deceives is one which is likely to be understood, and reasonably so, by many consumers. A more appropriate statement of the principle in this case might thus be that an otherwise false advertisement is not rendered acceptable merely because one possible interpretation of it is not untrue.

Respondents ask whether the ALJ (and presumably now the Commission) "take NCEN or the public for fools in asking them to believe that it is the existence of evidence itself and not a particular interpretation thereof that NCEN has denied?" (RB 29) We take neither NCEN nor the public for fools, but quite clearly many members of the public are not so well acquainted with the diet/heart disease controversy as is NCEN [16] or this Commission. Some consumers may indeed view the claim "No evidence" and realize, in light of their prior reading or consultation with a physician, that it is merely in-

tended to state respondents' opinion as to the way in which the existing evidence should be interpreted. Others, however, without substantial knowledge of the subject area, may well conclude that the claim means that those who would identify eggs as a possible contributor to heart disease have not based their indictment on a massive body of competent and reliable scientific studies, because such evidence does not exist.

After all, hardly a day passes on which one may not read in a newspaper or magazine of charges levelled by some self-appointed nutrition expert against the safety of some food product. How many substances remain that one can eat freely without, in the view of someone, increasing the risk of cancer or some other dread affliction? For certain of these charges the rejoinder "there is absolutely no evidence" may be an appropriate response. There is no scientific evidence. There are no competent and reliable scientific studies which could lead a body of well-qualified experts to subscribe to the charges. "No evidence," is, however, in the eyes of many people, strong language, indeed the strongest possible means of dismissing another's position. It may do literal and figurative justice when applied to the claims of quacks. It is not, however, standing by itself, an accurate way to characterize the position of those who hypothesize that consumption of dietary cholesterol, including that in eggs, increases the risk of heart disease.

The harm in this representation is, moreover, readily apparent. No consumer who wishes to make well-informed dietary selections should ignore the existing literature (or a physician's evaluation of it) with respect to the relationship between dietary cholesterol and heart disease. To be sure, well-informed consumers, like well-qualified scientists, are likely to draw different conclusions from their studies. As the record shows, eggs are a "complete food," with many nutritive virtues. (I.D. 56) A reasonable person might well decide that the current state of learning and opinion with respect to dietary

cholesterol does not warrant limitation of egg consumption to any degree. On the other hand, a reasonable person might equally well conclude that the existing evidence is sufficiently troublesome to [17] render some limitation or reduction in consumption of dietary cholesterol (including that in eggs) a prudent measure, as many experts now recommend. In either event, the decision is one which a consumer should make after a review of all available information. By representing that "there is no evidence that eating eggs will increase the risk of heart disease" respondents discourage that review and represent that there is no need for the consumer to go beyond their advertisement, because in this case there is simply "no evidence" to warrant further inquiry.

For the foregoing reasons we conclude as did the ALJ that respondents' principal representation is deceptive.[12] [18]

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[12] We also agree with the ALJ's conclusion that substitution of the word "proof" in certain publications (*i.e.*, "There is absolutely no scientific proof that eating eggs, even in quantity, will increase the risk of heart disease" does not cure the misrepresentation, because some people will read "proof" in the sense of "evidence," see *e.g. Webster's Third New International Dictionary*, p. 1817, I.D. 37). It should be apparent from the discussion herein that our finding in this matter cannot be taken in any measure as sanction for the representation that "The FTC has determined that there is evidence that dietary cholesterol may increase the risk of heart disease." Such a statement standing unqualified may be no less misleading to some than respondents' flat assertion that there is no evidence. What we have determined is simply that while medical experts disagree, many believe that the existing evidence indicates that increased consumption of dietary cholesterol may increase the risk of heart disease.

B. *Other Misrepresentations*

Respondents were also charged with making certain other deceptive representations to bolster their message that eating eggs, even in quantity, is not harmful, and in fact, positively desirable. Respondents do not contest that the alleged claims are misleading, but deny having made them. Our brief review of these issues follows:

(1) There is competent and reliable scientific evidence that dietary cholesterol, including that in eggs, is needed by the body for building sex hormones, for transmitting nerve impulses, and for maintaining life in cells.

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Respondents did not make this claim in so few words, but it is clearly implied by advertisements such as CX 3 which states in relevant part:

• • • there are those who misguidedly advocate cutting down on eggs because of their choleseterol content. So we thought we'd offer a few facts in evidence about what you're being asked to give up "now."

1. Cholesterol is the building block of sex hormones.
2. Cholesterol is needed for your nerves to transmit their impulses throughout your body.
3. Choleserol is essential for life for every cell in your body • • •.

The clear purport of the foregoing is that the consumer is being asked to "give up" a substance which is necessary for important bodily functions. In fact, as respondents acknowledge, dietary cholesterol, including that in eggs, is not needed for the foregoing functions (since the body produces its own), (I.D. 117) and the impression conveyed by their claim is thus deceptive. The deception is heightened by the context in which it appears, which is directed towards explaining why the cholesterol contained in eggs should not lead one to avoid [19] them. The fact that cholesterol made by the *body* is indispensable is obviously

of no relevance to whether one should or should not eat eggs. We affirm I.D. 47 which discusses this issue at greater length.

(2) there is competent and reliable scientific evidence that dietary cholesterol, including that in eggs, decreases the risk of heart disease; and that avoiding dietary cholesterol increases the risk of heart disease.

• • • • • • •

CX 2 represented:

There is absolutely no scientific evidence that eating eggs, even in quantity, will increase the risk of a heart attack. There is, in fact, preliminary evidence that the opposite is true, which has led Dr. Roger Williams to write, "Anyone who deliberately avoids cholesterol in his diet may inadvertently be courting heart disease."* In one recent sudy, four hundred obese, mostly middle-aged policemen were placed on a diet that included two or more eggs each day, by Dr. Sam S. Berman, a Boston physician. After eight years, there has not been a single heart attack reported in the group.

(The asterisk refers to a citation of the book "Nutrition Against Disease" by Dr. Roger J. Williams.)

The manifest implication of the above-quoted representation is that there exists scientific evidence, albeit "preliminary," that eating dietary cholesterol, including that in eggs, is helpful in preventing the risk of heart disease. None of the experts who appeared for either side in this proceeding was willing to offer any support for that proposition. (I.D. 113) The quotation by Dr. Williams cited in the advertisement is part of a larger selection from which it is clear that the author meant only that by avoiding dietary cholesterol, one might inadvertantly deprive himself or herself of other valuable nutrients, and the resulting state of malnutrition could increase the risk of heart disease. We affirm I.D. 42-44, 48, 113, and 114 which discuss these issues at greater length. [20]

(3) There is competent and reliable scientific evidence that eating eggs does not increase the blood cholesterol in a normal person.

There is competent and reliable scientific evidence that a person's blood cholesterol level is prevented from being raised or lowered by dietary cholesterol intake because (a) the human body increases its manufacture of cholesterol intake and (b) the human body eliminates the same amount of cholesterol as that eaten.

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Respondents do not deny making the first claim, (RB 46) since CX 1 states that "Eggs contain cholesterol—as do all foods of animal origin—but eating eggs does not increase the blood cholesterol in a normal person."

The judge concluded that the foregoing assertion was unsupported, and that the evidence of record led to the opposite conclusion. (I.D. 115) It is clear that scientists do disagree as to the extent to which a reduction in cholesterol consumption will affect levels of blood cholesterol. Moreover, it appears that for some people, increases in dietary cholesterol do not necessarily translate into increases in serum cholesterol. However, for other people, it is equally apparent that increases in consumption of dietary cholesterol, including that in eggs, will have an impact on serum cholesterol. (I.D. 115) It is obviously misleading, therefore, for respondents to claim, without qualification, that eating eggs will not increase the blood cholesterol level in a normal person.

With respect to the claims that the body's mechanisms operate to compensate for increases and decreases in dietary cholesterol intake, respondents claim that they merely represented that the body would produce or excrete "just about" as much cholesterol as was deducted from or added to the diet. While the "just about" language does occur in some of the challenged advertisements, we agree with the ALJ's conclusion in I.D. 46 that the implication of the claim in the context in which it is made is that the body's mechanisms operate to prevent an increase or

lowering of serum cholesterol in response to dietary modification. We affirm I.D. 45-46 and 115-116.[21]

C. *Corporate Name*

The ALJ concluded that the name "National Commission on Egg Nutrition" has the tendency and capacity to mislead the public into believing that the corporation is an impartial, independent, quasi-governmental health commission, when in fact it is an association of persons engaged in the egg industry. (I.D. 49) The judge reasoned that the words "National Commission" in particular would tend to enhance, misleadingly, the authority of NCEN's pronouncements in the eyes of the public. He therefore recommended that respondent NCEN be required to disclose in close proximity to its name the fact that it is an organization composed of egg producers and others of, or relating to, the egg industry. While a few of NCEN's advertisements did acknowledge that "We're egg people" or words to similar effect, none included this revelation in close proximity to the corporate name, and many advertisements contain no disclosure of corporate composition whatsoever. (I.D. 49)

NCEN recognized the importance of "what's in a name" when it chose its present title to replace the somewhat more accurate (perhaps too accurate) "Egg Industry Cholesterol Commssion." (I.D. 50) The name "National Commission on Egg Nutrition," unmodified, is likely to mislead readers as to the nature of the organization, given the number of "National Commissions" in the United States which are, in fact, independent, quasi-governmental bodies, see, *e.g.* Sullivan and Kruzas, *Encyclopedia of Governmental Advisory Organizations,* pp. 620-21, 619 (2d ed. 1975).

The deception is, moreover, highly material. Some people will view with skepticism the claims of industry members as to the virtues of that industry's products, especially if they are aware that the subject is a matter of some controversy. They are less likely to be mistrustful of the pronouncements of a "National Commission" which pub-

lishes lengthy excerpts from scientific studies "in the public interest" (CX 176) and assures its audience that it follows such matters very closely because "we're vitally concerned with health and good, natural nutrition." (CX 5) While exclusion of a misleading corporate or trade name is at times an appropriate remedy, *e.g. United States Naval Weekly, Inc.* v. *Federal Trade Commission,* 207 F. 2d 17 (D.C. Cir. 1953); *Federal Trade Commission* v. *Army and Navy Trading Co.,* 88 F. 2d 776 (D.C. Cir. 1937), we believe that the clarifying disclosure proposed by the ALJ is an entirely suitable and less drastic means of curing the deception here, and we shall include such a requirement in our order.[22]

D. *Reasonable Basis Claims; "There is (Overwhelming) Evidence that Eating Eggs Does Not Increase the Risk of Heart Disease"*

The order of the law judge would require that respondents desist from the following representations unless they possess "a reasonable basis" for them, consisting of competent and reliable scientific evidence upon which they rely for making their claim:

1. eating eggs does not increase the risk of heart attacks, heart disease * * * or any attendant condition.

* * * * * * * *

4. * * * any representation concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks * * * or any attendant condition.[13]

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[13] Par. I(B)(2) and (3) of the ALJ's order would also prohibit respondents from representing without a reasonable basis that dietary cholesterol, including that in eggs, decreases the risk of heart attacks, heart disease, or any attendant condition and that avoiding dietary cholesterol, including that in eggs, increases the risk of heart attacks * * * or any attendant condition. Since Par. I(A) of the order contradictorily forbids outright the claim that there is scientific evidence for these propositions, and since respondents concede there is no scientific evidence to support the claims (and indeed deny having made them), we shall omit the ALJ's paragraphs I(B)(2) and (3) from our order.

It is settled law that an advertiser in rendering an affirmative claim for a product must have a "reasonable basis" therefor, consisting of such evidence as is appropriate to provide substantiation for the type of claim being made. *Pfizer Corp.*, 81 F.T.C. 23 (1972); *National Dynamics Corp.*, 82 F.T.C. 488 (1973), aff'd, 492 F. 2d 1333 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398 (1973), aff'd, 481 F. 2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973). The justification for such a requirement is apparent. Many consumers are likely to assume that when a product claim is advanced which is in theory subject to objective verification, the party making it possesses a reasonable basis for so doing, and that the assertion does not constitute mere surmise or wishful thinking on the advertiser's part. As a result, the rendition of a claim based upon inadequate or nonexistent substantiation [23] violates Section 5 for failure to state a highly material fact, whose omission is deceptive.[14]

With respect to respondents' representation that eating eggs, even in quantity, does not increase the risk of heart attacks and heart disease, the ALJ concluded:

Respondents had no reasonable basis for making the representation * * * at the time the representation was first made. [Citations omitted] The substantiation necessary to form a reasonable basis for the representation would be the existence of a consistent body of competent

[14] Compare "Our product is safe" with "We think our product is safe, but we really have only the most inconclusive evidence upon which to base this statement." The latter formulation obviously cures the omission of fact but it is likely to induce considerably fewer consumers to buy the product. The Commission has also held that failure to possess a reasonable basis is unfair within the meaning of Section 5, *Pfizer, Inc., supra.* Under either theory, however, the source of illegality is the same—the abuse of legitimately held consumer expectations that advertising claims couched in objective terms are not merely statements of unsubstantiated opinion.

and reliable scientific evidence indicating that eating eggs does not increase the risk of CHD [coronary heart disease]. Such evidence should come from each of the various disciplines of medical science and be of the same caliber of design, analysis, and interpretation as the substantial existing body of evidence which supports the opposite conclusion—that eating eggs does increase the serum cholesterol level of most people and that the serum cholesterol level is related to an increase in risk of CHD. The substantiating data would also have to offer some rational explanation for the discrepancy of results between the claimed substantiating evidence and the existing body of evidence. [Citations omitted] (I.D. 118)

It is not entirely clear from respondents' brief on appeal whether or not they challenge this finding of the law judge. They do, in their brief, take exception to the ALJ's [24] finding that they represented that there was "overwhelming evidence" that eating eggs does not increase the risk of heart disease,[15] though they apparently do not object to the findings that they represented that there is "evidence" that eating eggs does not increase the risk of heart disease, and represented implicitly that they possessed a reasonable basis for their statement. (I.D. p. 78)[16]

[15] It is clear to us, however, that respondents did make the "overwhelming evidence" claim. CX 1 states, for instance, "there is absolutely no scientific evidence that eating eggs in any way increases the risk of heart attack. Yet the cholesterol bugaboo persists. The mystery is why. Why, in the face of overwhelming evidence to the contrary, do some people fear eggs, cholesterol, heart attacks?" See also I.D. 39-41 which we affirm.

[16] Note should be taken of the difference between denying the existence of evidence implicating eggs and affirming the existence of evidence exonerating them. While respondents' experts may conclude that the evidence cited against eggs does not warrant the hypothesis that their consumption increases the risk of heart disease, this does not neces-

Of course, a conclusion that there does not exist affirmative evidence to exonerate eggs does not mean that there cannot be a sensible basis for declining to limit one's egg consumption. As noted before, it is obvious from the record that some experts believe the existing evidence is not sufficient to warrant a reduction in egg consumption. It is deceptive, however, to buttress this conclusion with the suggestion that it is supported by affirmative evidence of eggs' harmlessness if such does not exist.

[25] Respondents object strenuously, however, to that portion of the law judge's proposed order [Par. I(B)(1)] which requires that they possess a reasonable basis, consisting of competent and reliable scientific studies, for any claim that eating eggs will not increase the risk of heart disease. They contend that the difficulty of determining what constitutes adequate substantiation for the claim will prevent them from making any assertions on this subject whatsoever. Respondents object similarly to proposed Par. I(B)(4) [RB 48].

In an ordinary case we would have little sympthy for respondents' contention. Parties making claims about the attributes of products—and particularly about the safety of products—owe to the public a high degree of precision and care. Where there is doubt, not merely as to the truth, but as to the substantiability of a claim, the public is seriously disserved by a presentation which implies that no doubt exists. Claims involving scientific judgments necessitate careful scientific evaluation before they may be made, and the difficulty and possible uncertainty involved

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[16] (Continued)
sarily mean that such evidence supports the affirmative conclusion that eggs do not increase the risk. The evidence may in the view of these experts simply be supportive of no conclusion on the subject.

in making such judgments should normally be no bar to requiring them.[17]

In the instant case, however, we believe a different approach is warranted. It is apparent that there is very little which respondents might claim or wish to claim in their publications that would not be construed by consumers as stating or implying that eating eggs, even in quantity, will [26] not increase the risk of heart disease. To insist upon a "reasonable basis" for such assertions in the face of an evolving body of scientific opinion would inevitably place the Commission in the position of having to resolve an issue as to which the record in this case warns that competent, well qualified experts are peculiarly likely to evince sharp disagreement.

The foregoing does not mean, of course, that merely because a scientific question is the subject of intense controversy an advertiser thereby achieves the right to represent unqualifiedly that truth resides on one particular side, with no warning to consumers whatsoever that a controversy exists and that substantial reputable authority takes the opposite view. Clearly it is deceptive for respondents to characterize the other side as armed with "no evidence" and themselves as in possession of "overwhelming evidence." Similarly it is patently deceptive

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[17] As the Commission noted in its *Pfizer* decision,

"[t]he question of what constitutes a reasonable basis is essentially a factual issue which will be affected by the interplay of overlapping considerations such as (1) the type and specificity of the claim made—*e.g.* safety, efficacy, dietary, health, medical; (2) the type of product—*e.g.* food, drug, potentially hazardous consumer product, other consumer product; (3) the possible consequences of a false claim—*e.g.* personal injury, property damage; (4) the degree of reliance by consumers on the claims; (5) the type, and accessibility of evidence adequate to form a reasonable basis for making the particular claims." (*Pfizer, Inc., supra* at p. 64)

for respondents to assert or imply unqualifiedly that egg consumption, even in quantity, will not increase the risk of heart disease and selectively cite authorities to this effect when, in fact, a substantial body of scientific opinion holds to the contrary.

The simple solution to this deception, we believe, is for respondents to indicate clearly and conspicuously in their advertising that the claim they seek to make for eggs is subject to substantial disagreement by qualified experts within the scientific community. This was basically the approach adopted by the Seventh Circuit Court of Appeals in granting an injunction against respondents' advertising. Complaint counsel in their brief to the Commission suggest a similar approach, (CB 54) although they would also retain reasonable basis provisions. Once it is made clear that respondents' claims are the subject of controversy, and that well-qualified reputable experts disagree, we think that the deception which may result from respondents' assertions of eggs' safety should be eliminated. Consumers, including those who lack extensive prior acquaintance with the cholesterol controversy, will recognize that respondents are merely stating their side of a complex, unresolved scientific debate, and treat such statements accordingly.

We believe that this remedial approach to the problem presented here is preferable from both the standpoint of respondents and consumers. On the one hand, were the Commission [27] to maintain a narrow view of what constitutes a "reasonable basis" for respondents' position and require that as a condition for its expression, it might indeed come at the expense of respondents' ability to publicize new developments in the field. On the other hand, were the Commission to adopt a more expansive view of "reasonable basis," it would be granting *carte blanche* to respondents to assure consumers directly or by implication that egg consumption is safe, without mention of the substantial contrary opinion. A similar right to deceive could, under the circumstances, hardly be denied those seeking to promote various low-cholesterol food products with the

unqualified claim that eating eggs or other high cholesterol foods will increase one's risk of heart disease.

Respondents argue that a requirement of affirmative disclosure is inappropriate because it forces them to make a statement with which they disagree [RRB 17], namely (in the case of the Seventh Circuit's proposed disclosure and that of complaint counsel) the statement that there is evidence that eating eggs may increase the risk of heart disease. While we do not agree that respondents raise a valid objection, we believe it is possible to accommodate their concern by requiring merely that they indicate in their advertisements that many medical experts believe that existing evidence indicates that consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease. It appears from the record of this case that respondents would not disagree with the foregoing formulation, nor need it occupy an inordinately large share of the extensive prose which respondents have of necessity been devoting to this very complex issue.

For the foregoing reasons we have omitted Sections I(B) (1) and I(B)(4) of the ALJ's proposed order. Paragraph I(B) of the order we have entered will permit respondents to make representations concerning the existence of scientific evidence or expert opinion supporting the view that eating eggs does not increase the risk of heart disease, or to describe such evidence, provided that respondents also disclose clearly and conspicuously in conjunction therewith the fact that many medical experts believe that existing evidence indicates [28] that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease.[18]

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[18] The Commission's authority to require affirmative disclosure in advertising is well-established, *e.g. J. B. Williams Company* v. *FTC*, 381 F.2d 884 (6th Cir. 1967); *Keele Hair & Scalp Specialists, Inc.* v. *FTC*, 275 F.2d 18 (5th Cir., 1960); *Ward Laboratories, Inc.* v. *FTC*, 276 F. 2d 952 (2d Cir. 1960), *cert. denied*, 364 U.S. 827 (1960); *Waltham Precision Instrument Co.* v. *FTC*, 327 F. 2d 427 (7th Cir., 1964), *cert. denied*, 377 U.S. 992 (1964).

Respondents also object to Paragraph I(C)(1) of the order proposed by the administrative law judge, which would prohibit misrepresentations of the existence, absence, or quantum of scientific evidence or proof concerning the relationship between eggs and heart disease. Respondents contend that the provision is unduly vague, and will thus prevent them from advertising. Whether or not this claim is valid, the Commission has determined to modify Paragraph I(C)(1) in slight measure in order to clarify its purpose, without diminishing the necessary protections against deception which it is designed to provide. Paragraph I(C)(1) entered herein parallels both Paragraph I(A)(2) of the notice order and the second operative paragraph of the injunction entered by the Seventh Circuit, prohibiting representations that the evidence that consumption of eggs will not increase the risk of heart disease is insignificant, and misrepresentations of the amount of evidence that consumption of eggs will not increase the risk, or that such evidence is "overwhelming."

We respect respondents' desire to discuss what they view as the deficient character of the scientific case heretofore made against eggs. It would be misleading for the reasons discussed earlier, however, for them to do so by claiming that "no evidence" exists against eggs. The same effect would be achieved were respondents able to dismiss the quantum of existing evidence (and by implication the extent of existing contrary authority) as insignificant, and hence not worth considering. Paragraph I(C)(1), like the injunctive provision on which it is modeled, will prevent this, without foreclosing respondents from expressing their views as to the nature and quality of the scientific case against eggs.[29]

III. FIRST AMENDMENT DEFENSE

Respondents contend that even if the Commission has jurisdiction over NCEN, its pronouncements on the subject of eggs and cholesterol are protected from regulation by the First Amendment. Respondents aver that they do

not claim a right to make false statements on matters of health (RRB 1) but they appear to maintain that the controversial nature of their subject matter and its status as a subject of public debate render their speech immune from regulation except perhaps insofar as it contains provable falsehoods.[19]

In its recent opinion in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, No. 74-895, 44 U.S.L.W. 4686 (May 24, 1976) [96 S.Ct. 1817] the Supreme Court dispelled what doubts may have lingered that speech does not lose all constitutional protection merely because it is designed to offer something for sale or convince the public of a product's virtues. At the same time, the Court reiterated that commercial speech is not "wholly undifferentiable" from other forms, and that the indulgence of deception which may be necessary for certain forms of expression to flourish is not essential in the commercial arena. As the court noted, "Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a state's dealing effectively with this problem." (44 U.S.L.W. 4693, n. 24) Similarly, the Court recognized that the nature of commercial speech may make it "appropriate to require that a commercial mes-

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[19] Of course, whether or not a statement is "provably false" depends in the first instance on what it means. Respondents themselves do not deny the falsity of the claims discussed at pp. 18-20, for example, but deny that their statements conveyed such claims. Similarly, respondents would presumably not deny the falsity of the message which we believe is clearly conveyed by their "no evidence" advertisements, although they would deny that such message is actually conveyed by their words. For these reasons we take respondents' First Amendment argument to be, in some measure, that the nature of their speech is such that the Commission must refrain entirely from evaluating it pursuant to the standards of Section Five, even if such evaluation would lead the Commission to conclude that it is false.

sage appear in such a form, or include such additional information, warnings and disclaimer, as are necessary to prevent its being deceptive." (*Id.*)

[30] There is, to be sure, enormous public interest in the vigorous dissemination of accurate product information to consumers by commercial organizations. That interest, which the Supreme Court perceived in the First Amendment, is no less at the heart of Section Five, whose goal of promoting competition is advanced in a climate of useful consumer information. Neither the objectives of the First Amendment, nor of the FTC Act are well-served, however, by commercial speech which is deceptive—which relies upon outright falsehoods or misleadingly oversimplified statements of complex issues to induce consumer beliefs and behavior that might differ considerably if greater precision were employed. As Justice Stewart noted in concurring with the majority in *Virginia Pharmacy Board*, "* * * the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decision-making." (44 U.S.L.W. 4695-96)

Although *Virginia State Board of Pharmacy* had not been decided at the time this matter was argued before the Commission, we think it evident from respondents' briefs that they do not view their representations as properly subject to the requirement of non-deceptiveness which the Court emphasized could appropriately be imposed upon commercial speech. Respondents argue in their briefs that their speech, far from being commercial, is rather akin to social or political advocacy, and that the Commission, therefore, may not interfere to any degree in their expression of "viewpoint." Alternatively they seem to suggest that the Supreme Court's decision in *Bigelow* v. *Virginia*, 421 U.S. 809 (1975) requires a "balancing" of interests before even misleading commercial

speech may be regulated, and that such balancing weighs here in favor of regulatory abstinence. We cannot agree.[20]

[31] While there are no doubt aspects of the cholesterol controversy which impinge upon politics and governmental policy, those are not the focus of respondents' publications, all of which are directed toward conveying, by varying techniques, the message that eggs are entirely safe to eat, even in quantity, because consumption of dietary cholesterol will not increase the risk of heart disease, or at least has not been implicated by scientific evidence. Respondents' early publications (CX 1ff.) convey the message in a conventionally commercial format (*e.g.*, "The Sexy Egg"). Later publications make the same point by means of excerpts from a small and not particularly representative sample of the scientific literature, accompanied by appropriate commentary and professions of charitable intent, *e.g.* "the public has the right to know."

There are significant differences, we believe, between scientific health claims made about a product by a commercial organization and commentary on genuine political or social issues, differences which warrant their well-recognized disparity in legal treatment. Arguments directed to social and political issues, where made by individuals or corporations, are likely to be recognized by the public as expressions of opinion, by their very nature subject to controversy and substantial reputable disagreement. Even interspersed "factual" statements are likely to be viewed

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[20] We do not wish to mischaracterize respondents' position. They do maintain, of course, that their representations are neither false nor misleading. On the other hand they are apparently unwilling to concede that resolution of this lawsuit depends solely on whether or not the deciding tribunal agrees on that point. For this reason we understand them to be asserting as defense that the First Amendment does exempt their statements from liability, even if they are misleading by the standards customarily applied by the Commission in analyzing product claim.

with the skepticism reserved for an advocate's expression of a disputed point of view. We do not think that consumers, or at least a substantial segment of consumers, necessarily reserve the same skepticism in viewing what puport to be largely or entirely factual scientific recitations of the health and nutritive virtues of a food product by a party presumptively in possession of all information relevant thereto, cf. *Virginia State Board of Pharmacy, supra*, p. 4693, n. 24. While few might still agree that "advertisements contain the only truths to be relied on in a newspaper" (Thomas Jefferson, "Letter to Nathaniel Macon"), they are clearly an important source of decision-guiding data for consumers.

Perhaps this is not the way it should be. Perhaps when consumers read that "there is absolutely no scientific evidence that eating eggs, even in quantity, will increase the risk of heart disease" they should all recognize this as merely the advertiser's interpretation of a controversial body of evidence, and view it with the appropriate skepticism. But would respondents also desire, and would it truly be in the public interest, if consumers were to accord the same intense degree of skepticism to statements which occur a few sentences earlier in their advertisement: "• • • eggs have fewer calories per gram of protein than any other natural food • • •. Eggs are an important source of vitamins A,B,D, and E and are a preferred source of iron." (CX 2)

[32] To the contrary, we believe that some consumers do, and have a right to place substantial faith in nutrition and health claims made by commercial organizations. If an advertiser assures them that the product being touted contains plentiful quantities of a vitamin, or abundant amounts of protein, they have a right to assume that these statements would compel the assent of all or nearly all experts within the relevant scientific community. Similarly, when an advertiser, (or a "National Commission on Egg Nutrition") which presumably knows everything there is to know about the product being discussed, assures the

public that product is safe, or that there is "No evidence" that it is unsafe, the public will, and we think has a right to, assume that the advertiser is doing more than expressing an opinion that would at best obtain the qualified assent of a mere fraction of those professionally competent to evaluate it.

For the foregoing reasons we must reject respondents' contention that their publications are, like true political commentary, constitutionally immunized from the necessity to adhere to the standards of Section Five of the Federal Trade Commission Act. Similarly, we doubt that the *Bigelow* case compels the application of a balancing of interests test in each particular case before any regulation whatsoever may be applied to *misleading* commercial speech. That balance has already been struck on a categorical basis, a fact recognized by the Supreme Court in *Virginia Board of Pharmacy* if not in *Bigelow* itself. Assuming, however, *arguendo* that such balancing is appropriate, we conclude that it weighs heavily here in favor of regulation for the following reasons:

There is scant public benefit and considerable actual and potential public harm (I.D. 109-110, 127) in advertising which assures all members of the public that there is no reason to doubt that they may eat as many eggs as they wish without any increase in the risk of heart disease, without a mention that a major segment, perhaps a substantial majority, of the relevant expert community strongly disagrees.

Respondents claim that their advertising serves the worthy purpose of firing debate in an area marked by misinformation and misconception. To be sure, the exhibits introduced by respondents demonstrate that they have no monopoly on the dissemination of misinformation concerning the relationship [33] between dietary cholesterol and heart disease, although their advertisements are probably more likely to catch the eye than the nutrition articles to which they object. Nevertheless, assuming *arguendo* that respondents' publications may indeed pro-

voke valuable consumer debate, there is no reason to conclude that such debate could not and will not be equally well encouraged, without deleterious side effects, by advertising that is not misleading. As the Supreme Court noted in *Virginia Board of Pharmacy,* "[s]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely." 44 U.S.L.W. 4693, n. 24.

In addition to the public debate, respondents suggest that regulation of their publications will chill "independent thought and variance from government orthodoxy by those who can contribute to the science of the matter." (RB 36) We agree, of course, that the First Amendment exists to foster the search for truth as well as the expression of opinion, and that search may entail societal sufferance of many deceptions, real and imagined, along the way. This consideration weighs overwhelmingly in favor of the right of scientists to disseminate their views free of scrutiny, or of journalists and publishers to report upon or promote scientific works, despite an incidental commercial effect, *e.g. Scientific Manufacturing Co.* v. *FTC,* 124 F. 2d 640 (3rd Cir. 1944).

The foregoing consideration is far less compelling, however, in the case of those who would simply use, or misuse, the works of scientists for the purpose of convincing the public of a scientific proposition in order to promote the sale of a commercial product, *e.g. Perma-Maid Co.* v. *FTC,* 121 F. 2d 282 (6th Cir. 1941); *Koch, et al.* v. *FTC,* 206 F. 2d 311 (6th Cir. 1953). It should be apparent that the Commission in its decision has expressed no view as to the merits of the diet/ heart disease hypothesis, and the Commission's opinion, like that the ALJ, simply cannot be taken as an endorsement of anyone's orthodoxy except perhaps by those scientists who, in most unscientific fashion, choose to draw conclusions about a document without reading it. For these reasons we cannot take seriously respondents' suggestion that those who would do research in this area will in any way be deterred by a Commission

decision adverse to NCEN, and we must similarly conclude that no reason exists in this case to warrant the Commission's departure from its statutory duty to proscribe false and misleading advertising.

[34] The foregoing is not to say, as should by now be clear, that we view the issues raised by respondent and the peculiar nature of this case to be wholly irrelevant to our decision and particularly the question of appropriate relief herein. As noted in the preceding discussion of "reasonable basis," [Part II(D)] we do believe that the nature of the dispute here in issue warrants a somewhat different order from that which might ordinarily be appropriate. We believe that the order we have entered herein should adequately accommodate those interests which respondents claim warrant complete regulatory exemption. Paragraph I(A) of the order will prohibit certain precisely defined and demonstrated falsehoods which may be used to convince people of eggs' safety and nutritive virtue. It will also require respondents to disclose that NCEN is an organization of egg industry people. At the same time, the order will not prevent respondents from presenting to consumers their point of view regarding the safety of eggs, provided they make it clear that their assertions are subject to substantial expert disagreement. Substitution of affirmative disclosure for the requirement of "reasonable basis" is intended to maximize the certainty with which respondents may advertise, since inclusion of the disclosure in conjunction with a representation described in Par. II(B) will suffice to immunize the representation from liability under the order.

Respondents also object to the order on grounds that while it purports to be applicable only to "advertisements" it gives inadequate guidance as to what publications fall under that term. Complaint counsel suggest a two-part test: (1) is the publication used in connection with the sale or promotion of a product, and (2) does it have a tendency or capacity to induce the sale of, or to affect any other commercial behavior toward, the product?

Cf. Koch, et al. v. *FTC, supra,* at 318 (6th Cir. 1953). In view of the nature of respondent NCEN, described in part I of this opinion, it is obvious that any publication disseminated by it in mass media to the lay public, and satisfying the second criterion, also satisfies the first. We think the traditional standard of whether or not a publication has the tendency or capacity to induce the sale of a product is also not unduly vague. Publications designed to convey the point that consumption of a particular product, will not increase the risk of heart disease, are clearly likely to induce the purchase of that [35] product. The fact that the message is conveyed by means of selected quotations from the works of scientists and popular writers does not alter the commercial character of the publication. Nor is it altered by self-serving professions of eleemosynary intent, *e.g.* "Brought to you in the public interest." If anything the misleading effect of respondents' advertisements is enhanced by casting them in the guise of a "public service message" presented by an unidentified "National Commission".[21]

The term "advertisement" is one which has generally been thought sufficiently clear by courts applying it in Section Five orders, including the Seventh Circuit which used the term in issuing an injunction in this matter. (517 F. 2d 485, 491.) We think it is sufficiently clear in this case. We do not doubt that if respondents wish, after entry of an order, to continue the misrepresentations prohibited therein, their ingenious efforts to create a "non-advertisement" in which to do so may raise close questions of interpretation. That, however, can be no reason in this, or in any other case, for withholding entry of an order to prohibit the recurrence of what are clearly misleading advertisements.

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[21] In this regard we must reject the suggestion attributed to the ALJ (RB 21ff.) that CX 171-173 and 175-176 are necessarily not commercial publications, although they do not form the basis for our finding of liability in this matter.

For the foregoing reasons the initial decision of the administrative law judge is affirmed, except to the extent modified herein.[22] An appropriate order is appended.[23] [36]

APPENDIX

The findings of fact and conclusions of Law set forth in the initial decision of the administrative law judge are adopted by the Commission, except to the extent they are qualified in the Commission's opinion and in this appendix:

I.D 14, p. 9,	Add to the end of line 3, "in at least certain documented instances"
I.D. 21, p. 12,	delete "(Smith, 1635-36)" [Although the conclusion of the ALJ for which citation is given in support is correct and apparent from the face of the advertisements, the citation is inapposite.]
I.D 59, p. 32,	delete "and most authoratative [sic]"

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[22] In addition to modifications described in the text, we have reviewed the initial decision and respondents' objections to it at RB 1a-6a, and have made certain changes in the initial decision findings adopted by the Commission. These are recited in the Appendix to this opinion.

[23] We have modified a paragraph proposed by the ALJ which would have required NCEN to require its members to sign an agreement to abide by terms of the order as a condition of membership. The order entered will simply require that NCEN members be provided with copies of the order. To the extent that NCEN acts through its members, or that its members act on its behalf the corporation will be liable. While the signature provision is clearly a necessary remedy in certain cases, we can perceive no need for it here.

I.D. 106, p. 57,	change "The qualifications as experts on CHD are unchallenged" to "They are well-qualified as experts on CHD"
I.D. 110, p. 59,	add at end of finding, "Of course, Dr. Blackburn's estimate must be qualified in light of his acknowledgment that he cannot be certain that increases in serum cholesterol levels would in fact result in increases in the rate of CHD. Tr. 377-79"
I.D. 120, p. 65,	amend final sentence on this page to read: "Rather, the proper conclusion with respect to the viewpoint of those experts quoted hereinabove is approximated by this statement by the Inter-Society Commission for Heart Disease Resources (Finding 102 *supra*):"
I.D. 120, p. 66,	delete sentence beginning "The testimony relied upon • • •" [This subject is more fully discussed in Part I of this opinion.]

FINAL ORDER

[1] This matter having been heard by the Commission upon the appeal of respondent from the initial decision, and upon briefs and oral argument in support thereof and

opposition thereto, and the Commission for the reasons stated in the accompanying opinion having determined to sustain the initial decision with certain modifications:

It is ordered, That the initial decision of the administrative law judge, pages 1-95, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent indicated in the accompanying opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is ,entered:

ORDER

I

It is ordered, That respondents National Commission on Egg Nutrition and Richard Weiner, Inc., corporations, their successors and assigns, either jointly or individually, and [2] respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of eggs for human consumption do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents that there is no scientific evidence that eating eggs increases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition;

2. Represents that there is scientific evidence that dietary cholesterol, including that in eggs, decreases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attending condition;

3. Represents that there is scientific evidence that avoiding dietary cholesterol, including that in eggs, increases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition;

4. Represents that eating eggs does not increase the blood cholesterol level in a normal person;

5. Represents that the blood cholesterol level is prevented from being raised or lowered by dietary cholesterol intake;

6. Represents that the human body increases its manufacture of cholesterol in an amount equal to a decrease in dietary cholesterol intake;

7. Represents that the average human body eliminates the same amount of cholesterol as that eaten;

[3] 8. Represents that dietary cholesterol, including that in eggs, is needed by the body for building sex hormones, for transmitting nerve impulses and for maintaining life in cells; or

9. Utilizes the name "National Commission on Egg Nutrition" unless it is clearly and conspicuously disclosed in immediate conjunction with the name that the National Commission on Egg Nutrition is composed of egg producers and other individuals and organizations of, or relating to, the egg industry.

B. Disseminating, or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act which directly or indirectly

1. Represents that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition or represents that there exists, or describes scientific evidence which supports the theory that consumption of dietary cholesterol, including that in eggs, does not increase the risk

of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition or

2. Makes any representation concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition *unless* it is clearly and conspicuously disclosed in immediate conjunction therewith that many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease.

[4] C. Disseminating, or causing the dissemination of, any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents as insignificant the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition, or represents that there is overwhelming scientific evidence or otherwise misrepresents the amount of scientific evidence that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition.

2. Misrepresents in any manner the physiological effects of consuming dietary cholesterol or eggs.

II

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions, and to all current and future members of respondent National Commission on Egg Nutrition.

It is further ordered, That each respondent notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure such as dissolu-

tion, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

If is further ordered, That each respondent shall, within sixty (60) days after this order becomes final, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

NATIONAL COMMISSION ON EGG NUTRITION and Richard Weiner, Inc.,

Petitioners-Appellants,

vs.

FEDERAL TRADE COMMISSION,

Respondent-Appellee.

Nos. 76-1969 and 76-1975.
United States Court of Appeals, Seventh Circuit.
Argued June 17, 1977.
Decided No. 29, 1977.
As Amended Dec. 6, 1977.

Supplemental Opinion on FTC's Motion to Amend Judgment Jan. 23, 1978.

Following remand, 517 F.2d 485, Federal Trade Commission entered order prohibiting false and misleading advertising by egg industry trade association concerning the relationship between cholesterol, eggs, and heart disease. The Court of Appeals, Tone, Circuit Judge, held that: (1) evidence sustained determination that representations made by the industry and various advertisements had been false; (2) the statements complained of were not immune under the First Amendment from FTC action; (3) order was not unconstitutionally vague, but (4) industry should not have been required to include, in any future statements concerning the relationship between eggs and heart disease, information that many medical experts believe that increased consumption of cholesterol may increase the risk of heart disease.

Enforced in part.

1. Amicus — 1

Argument which was not made before the Federal Trade Commission or by the parties themselves in the Court of Appeals was not properly before the Court of Appeals when presented in brief filed by amicus curiae.

2. Trade Regulation — 802

Evidence sustained determination of Federal Trade Commission that advertising statements made by trade association of the egg industry concerning lack of relationship between cholesterol, eggs, and heart disease were false.

3. Constitutional Law — 90(1)

First Amendment embraces the interests of both the speaker and the prospective audience. U.S.C.A.Const. Amend. 1.

4. Constitutional Law — 90.1(1)

Advertising statements of egg industry which categorically and falsely denied the existence of evidence considering relationship between cholesterol, eggs, and heart disease, which evidence in fact existed, were not immune under the First Amendment from FTC order prohibiting false advertising. U.S.C.A. Const. Amend. 1; Federal Trade Commission Act §§ 5, 12, 15 U.S.C.A. §§ 45, 52.

5. Trade Regulation — 816

Neither the use of the term "advertisement" in FTC order prohibiting certain misleading statements in advertising nor statement of the Administrative Law Judge that he did not predicate a finding of violation on certain materials published by the respondent rendered the order unconstitutionally vague. Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52.

6. Trade Regulation — 816

Provision of Federal Trade Commission order prohibiting advertising which represented as insignificant the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease or which otherwise misrepresented the amount of scientific evidence that eating eggs does not increase the risk of heart attacks was not unconstitutionally vague. Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52; U.S.C.A.Const. Amend. 1.

7. Trade Regulation — 812

Federal Trade Commission, in barring false and misleading advertisements, was not limited to prohibiting the precise misrepresentations which had occurred in the past. Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52.

8. Constitutional Law — 90.1(1)

First Amendment does not permit Federal Trade Commission to impose a remedy for false and misleading advertising which is broader than that necessary to prevent deception or correct the effects of past deception. U.S.C.A. Const. Amend. 1; Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52.

9. Trade Regulation — 812

In the absence of showing a long history of deception on the part of egg industry with respect to advertisements concerning relationship between cholesterol, eggs and heart disease, Federal Trade Commission requirement that the industry include in any future advertisements concerning the relationship between eggs and heart disease the statement that many medical experts believe the increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart attack; the egg industry should not have been required to argue the other side of the controversy; the requirement could be imposed only when the industry chose to make a representation as to the state of available evidence or information concerning the controversy. U.S.C.A.Const. Amend. 1; Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52.

James L. Fox, Donald P. Colleton, Chicago, Ill., for petitioners-appellants.

John T. Fischbach, Atty., F T. C., Washington, D. C., for respondent-appellee.

Before SPRECHER and TONE, Circuit Judges, and CAMPBELL, Senior District Judge.*

TONE, Circuit Judge.

The subject of this appeal is commercial speech under the First Amendment. Acting pursuant to its power to prohibit false and misleading advertising, the Federal Trade Commission has entered a final order directing petitioners to cease and desist from disseminating advertisements containing statements to the effect that there is no scientific evidence that eating eggs increases the risk of heart and circulatory disease.[1] Certain statements ancillary to the one just described are also prohibited, and the right to make still others is limited and conditioned by the order. We sustain the order, except for a provision which we hold to be overbroad

Petitioners are a trade association that calls itself the National Commission on Egg Nutrition (NCEN), and its advertising agency, Richard Weiner, Inc. Despite its official-sounding title, NCEN was formed by members of the egg industry, to counteract what the FTC described as "anti-cholesterol attacks on eggs which had resulted in steadily declining per capita egg consumption." To carry out this mission, NCEN, with Weiner's assistance, mounted an advertising and public relations campaign to convey the message that eggs are harmless and are needed in human nutrition. In 1974 the FTC filed a complaint charging petitioners with having violated §§ 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52, by placing newspaper advertisements containing various false

* The Honorable William J. Campbell, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

[1] The term "heart and circulatory disease" is used in this opinion to include, in the Commission's phrase, "heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition."

and misleading statements with respect to the relationship between eating eggs and heart and circulatory disease. In its answer, NCEN admitted that it had made representations in its advertising concerning the absence of scientific evidence that eating eggs increases the risk of heart and circulatory disease and also had represented that eating eggs does not increase the blood cholesterol level in a normal person, but stated that it was no longer making such representations in its advertising. NCEN did not contest that other representations charged were misleading but denied having made them.

After filing its complaint, the FTC sought a temporary injunction in the District Court under § 13(a) of the Federal Trade Commission Act, 15 U.S.C § 53(a), to prohibit NCEN from continuing its allegedly false advertising while the administrative proceeding was pending. The District Court denied the relief sought by the FTC. We reversed and directed the entry of an injunction forbidding the misrepresentations complained of but allowing NCEN to make "a fair presentation of its side of the controversy." *FTC* v. *National Commission on Egg Nutrition*, 517 F.2d 485, 489 (7th Cir. 1975), *cert. denied*, 426 U.S. 919, 96 S.Ct. 2623, 49 L.Ed.2d 372 (1976).

After hearing the evidence, an administrative law judge sustained the allegations of the complaint and recommended a cease and desist order. On appeal to the FTC, the ALJ's findings were sustained and the recommended order was adopted with some modifications. NCEN and Weiner have filed petitions for reveiew of that order by this court. Only NCEN has filed a brief.

The order directs NCEN and Weiner to cease and desist from disseminating, by mail or means in or affecting commerce, advertising which directly or indirectly makes certain specified representations. The one which is of principal concern here is "that there is no scientific evidence that eating eggs increases the risk of . . . heart [and circulatory] disease . . . ." Other specifically pro-

hibited statements, which the FTC found petitioners had made in the past, are variations on the same general theme.[2] In addition, any representation concerning the relationship of eating eggs, or of dietary cholesterol, including that in eggs, to heart and circulatory disease, is permissible only if

> it is clearly and conspicuously disclosed in immediate conjunction therewith that many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease.

Also forbidden is any statement which

> [r]epresents as insignificant the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of . . . heart disease, . . . or represents that there is overwhelming scientific evidence or otherwise misrepresents

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[2] Petitioners are forbidden from making any statement which directly or indirectly represents

> . . . that there is scientific evidence that dietary cholesterol, including that in eggs, decreases the risk of . . . heart [and circulatory] disease . . .;
> . . . that there is scientific evidence that avoiding dietary cholesterol, including that in eggs, increases the risk of . . . heart [and circulatory] disease . . .;
> . . . that eating eggs does not increase the blood cholesterol level in a normal person;
> . . . that the blood cholesterol level is prevented from being raised or lowered by dietary cholesterol intake;
> . . . that the human body increases its manufacture of cholesterol in an amount equal to a decrease in dietary cholesterol intake;
> . . . that the average human body eliminates the same amount of cholesterol as that eaten;
> . . . that dietary cholesterol, including that in eggs, is needed by the body for building sex hormones, for transmitting nerve impulses and for maintaining life in cells. . .
>
> the amount of scientific evidence that eating eggs does not increase the risk of . . . heart disease . . . [or] [m]isrepresents in any other manner the physiological effects of consuming dietary cholesterol or eggs.

The order also prohibits NCEN from using its name ". . unless it is clearly and conspicuously disclosed in immediate conjunction with the name that the National Commission on Egg Ntrition is composed of egg producers and other individuals and organizations of, or relating to, the egg industry."

[1] NCEN does not challenge the requirement that it identify itself as a trade association if its wishes to continue using its current title. Nor does it specifically challenge the findings that the various statements found to have been made, other than the "no scientific evidence" statement, were false and misleading. The debate before us is focused on that statement, *i.e.*, that there is no scientific evidence linking the eating of eggs to an increased risk of heart and circulatory disease. NCEN argues, first, that the statement is true; second, that even if it is misleading, the FTC's prohibition infringes upon NCEN's First Amendment rights; and, finally, that even if the FTC's holding of a violation is upheld, its order is unconstitutionally vague and overbroad, going beyond what is necessary to remedy that violation.[3]

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[3] The Association of National Advertisers, Inc., in an *amicus* brief filed in support of NCEN, argues that the FTC's hearing procedures violated the First Amendment standards set forth in *Blount* v. *Rizzi*, 400 U.S. 410, 417, 91 S.Ct. 423, 27 L.E.2d 498 (1971). As the FTC points out, however, this argument was not made before the FTC or even by the petitioners themselves in this court and is therefore not properly before us. See *American Meat Institute* v. *Environmental Protection Agency*, 526 F.2d 442, 449 (7th Cir. 1975).

I. *Falsity*

[2] What the FTC describes as the "diet/heart disease" hypothesis, subscribed to by "many well-qualified medical science experts . . ., with varying degrees of conviction," is as follows: For many people, the amounts of cholesterol and saturated fats which are ingested affect the risk of heart and circulatory disease; increasing the amounts increases the risk, and decreasing the amounts decreases the risk.

Egg yolks contain substantially more cholesterol than any other commonly eaten food and are a major contributor of cholesterol in the American diet. The yolk of one egg provides cholesterol in an amount equal to about one-third of the average daily per capita consumption of cholesterol. (Although the yolk also contains saturated fat, the amount per egg is equal to less than four percent of the average per capita intake of that substance.)

The diet/heart disease hypothesis is based on several propositions: First, in many people the cholesterol level in the blood stream (serum cholesterol) is affected by the amount of cholesterol and saturated fat in the diet. Second, relatively high levels of serum cholesterol have been associated with relatively high incidence of coronary heart disease in sample populations. Third, relatively high levels of serum cholesterol contribute to the formation of atherosclerotic lesions, which precipitate heart disease. These propositions have been formulated by scientists based upon, in the FTC's words, "the results of a large body of clinical-pathological, experimental, and epidemiological studies." After describing these studies, the ALJ had found that they

> were conducted using scientific methodologies, were performed by competent and highly regarded investigators, have been reported in recognized scientific journals after peer review, and have been generally

> accepted by experts in the field and by the scientific community.

These administrative findings of fact are not challenged by NCEN. Instead, it relies upon testimony of its own expert witnesses that some scientists and doctors are not persuaded by the studies, and that in the opinion of the witnesses the sudies are not "evidence" and, in the words of one witness, "would not convince anybody that the number of eggs consumed does increase the risk of ischemic heart disease."

The FTC concluded that, impossible though it may be to determine whether consuming eggs in fact increases the risk of heart and circulatory disease, it is possible to determine the existence and amount of evidence on that issue. Referring to the testimony of NCEN's experts that, in their opinion, there was no evidence of a connection between eggs and heart and circulatory disease, the FTC said that

> in rendering their testimony respondents' witnesses did not dispute the fact that many experts, in the exercise of reasonable, albeit disputed, scientific judgment, have relied upon a large body of scientific studies in formulating the diet/heart disease hypothesis.

Responding to the argument that the "no evidence" statement would be recognized by readers as merely an expression of opinion, the FTC said,

> Unfortunately, however, the phrase "there is no evidence" is also, and perhaps more reasonably subject to the interpretation that "there do not exist competent and reliable scientific studies from which well-qualified experts could reasonably hypothesize that

eating eggs increases the risk of heart disease." This latter message is patently false and misleading.[4]

As the Third Circuit observed in *Beneficial Corp.* v. *FTC*, 542 F.2d 611, 617 (1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977), "[w]hether particular advertising has a tendency to deceive or mislead is obviously an impressionistic determination more closely akin to a finding of fact than to a conclusion of law." Applying the "substantial evidence" rule, and giving due regard to the FTC's expertise, we cannot disturb the finding.

Moreover, our own finding, if it were our province to make one, would be less charitable to petitioners than that of the FTC. The various scientific studies and that expert opinions based on those studies constitute evidence, not merely in the legal sense, but in the commonly understood sense of that word. That a given expert is not persuaded by the studies does not remove them, or another expert's contrary opinion, from the category of evidence.

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[4] The FTC went on to say,

> It is well established, and critical to the notion of preventing false advertising, that where an advertisement conveys more than one meaning, one of which is false, the advertiser is liable for the misleading variation. *Murray Space Shoe Corp.* v. *FTC*, 304 F.2d 270, 272 (2d Cir. 1963); *Rhodes Pharmacal Co.* v. *Federal Trade Commission*, 208 F.2d 383, 387 (7th Cir. 1953), modified by restating the Commission's order, 348 U.S. 940, 75 S.Ct. 361, 99 L.Ed 736 (1953). Nor does our application of that principle in this instance rest upon some mere semantic quibble or strained interpretation of words, since that meaning of respondents' claim which deceives is one which is likely to be understood, and reasonably so, by consumers. A more appropriate statement of the principle in this case might thus be that an otherwise false advertisement is not rendered acceptable merely because one possible interpretation of it is not untrue.

After reviewing the record now before us, we find no reason to alter the conclusion stated in our opinion on the interlocutory appeal:

> NCEN has done more than espouse one side of a genuine controversy . . . . It has made statements denying the existence of scientific evidence which the record clearly shows does exist. These statements are, therefore, false and misleading.

517 F.2d at 489.

II. *The First Amendment*

The argument most strongly pressed is that the FTC's order impinges upon First Amendment guarantees, which, at least since *Bigelow* v. *Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), extend to commercial speech. It is argued that the principles established in *Virginia State Board of Pharmacy* v. *Virgina Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), prohibit the agency from considering the content of the statement without reference to the state of mind with which it was uttered, and require that a commercial misrepresentation on a controversial public issue be treated in the same manner as it would a libel of a public figure, see *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.E.2d 686 (1964), *i. e.*, as actionable only if it is made deliberately or with reckless disregard for the truth.

In the *Virginia Pharmacy* opinion, upon which NCEN relies, the Court expressly recognized that the First Amendment did not interfere with a "State's dealing effectively" with the problem of "deceptive or misleading" commercial speech, even when it is "not provably false, or even wholly false." The state is not prohibited "from insuring that the stream of commercial information flow cleanly as well as freely." 425 U.S. at 771-772, 96 S.Ct. at 1831. This position was amplified by the Court in *Bates* v. *State Bar of Arizona*, ... U.S. ....., ..., 97 S.Ct. 2691, 2708-2709, 53 L.Ed.2d 810 (1977):

> Advertising that is false, deceptive, or misleading of course is subject to restraint. See *Virginia Pharmacy Board* v. *Virginia Citizens Council*, 425 U.S. at 771-772 [96 S.Ct. 1817] and n. 24 . . . Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. *Id.*, n. 24. . . . And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.

See also Mr. Justice Steven's statement in *Young* v. *American Mini Theatres*, 427 U.S. 50, 68-69, 96 S.Ct. 2440, 49 L.Ed 2d 310 (1976); and see *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 1618, 52 L.Ed.2d 155 (1977).

[3] The Court's recognition that the First Amendment does not preclude restraint of false, misleading, or deceptive advertising is consistent with the principle that the protection afforded to speech of any kind is to be determined by "assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Bigelow* v. *Virginia, supra*, 421 U.S. at 826, 95 S.Ct. at 2235. The First Amendment interest is twofold: it embraces the interests of both the speaker and the prospective audience, which, in the case of commercial speech, consists of consumers. The consumers' interest, which is in obtaining information on which to base the decision of whether to buy, see *Linmark Associates, Inc.* v. *Township of Willingboro, supra*, 97 S.Ct. at 1618, is served by insuring that the information is not false or deceptive, and, in fact, coincides with the public interest served by the regulation. The fact that

health is involved enhances the interests of both consumers and the public in being assured "that the stream of commercial information flow cleanly as well as freely." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra*, 425 U.S. at 772, 96 S.Ct. at 1831. When these considerations, together with those expressed by the Court in *Bates* relating to the hardiness of commercial speech, are balanced, the scale is tipped in favor of regulation.

[4] NCEN argues that its advertisements do not fit the paradigm of commercial speech which the Court had in mind in *Virginia Pharmacy, viz.*, "speech that does 'no more than propose a commercial transaction,' " 425 U.S. at 771, 96 S.Ct. at 1830, n. 24, quoting from *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. 376, 385, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973), but rather were expressions of opinion on an important and controversial public issue. Thus, it is said, they are more like the paid political advertisements in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). First, as to the nature and purpose of NCEN's statements, they were not phrased as statements of opinion but categorically and falsely denied the existence of evidence that in fact exists and were made for the purpose of persuading the people who read them to buy eggs. Second, as to the nature of the issue, the right of government to restrain false advertising can hardly depend upon the view of an agency or court as to the relative importance of the issue to which the false advertising relates. Third, as to the intended scope of the Supreme Court's expressions on the subject of commercial speech, we believe they were not intended to be narrowly limited to the mere proposal of a particular commercial transaction but extend to false claims as to the harmlessness of the advertiser's product asserted for the purpose of persuading members of the reading public to buy the product. The nature of the communication is not changed when a group of sellers joins in advertising their common product. See Note, *Protection for Commercial Advertising*, 44 U.ChiL.Rev. 205, 231 (1976).

The considerations the Court has viewed as distinguishing commercial speech from other speech, stated in the passage from *Bates* quoted above, are present here. The order does not offend the First Amendment.

III. *Vagueness*

[5] NCEN's argument that the order is unconstitutionally vague is based on the ALJ's statement of his reasons for not "predicat[ing]" a "finding of violation" on certain of the material published by NCEN. In the material in question were quotations from an advisory report of a committee of British experts published by the British Government and from an editorial in an American medical journal, and commentary by NCEN critical of governmental action, including that of the FTC in this case. The ALJ said these materials "may warrant First Amendment protection," because they lacked the "strong promotional message" of the condemned material, were "basically true," contained information which was "a matter of public concern," and constituted "comment on government action." The FTC, however, stated,

> [W]e must reject the suggestion attributed to the ALJ . . . that [the materials just described] are necessarily not commercial publications, although they do not form the basis for our finding of liability in this matter.

In addition, after defining "advertising" to require a "tendency or capacity to induce the sale of the product," the FTC said,

> Publications designed to convey the point that consumption of a particular product, will not increase the risk of heart disease, are clearly likely to induce the purchase of that product. The fact that the message is conveyed by means of selected quotations from the works of scientists and popular writers does not alter the commercial character of the publication. Nor is it altered by self-serving professions of

> eleemosynary intent, e.g. "Brought to you in the public interest".[*] If anything the misleading effect of respondents' advertisements is enhanced by casting them in the guise of a "public service message" presented by an unidentified "National Commission".

The FTC's pronouncement eliminates any confusion the ALJ's statement may have caused. Further clarification is available from the FTC upon request, if the need arises. 16 C.F.R. § 3.61(d). See *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965). Neither the use of the term "advertisement" nor the comments of the ALJ on which NCEN bases its argument render the order unconstitutionally vague.

[6, 7] The FTC's order also prohibits (in paragraph I, C) advertising which

> represents as insignificant the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition . . . .

or which

> otherwise misrepresents the amount of scientific evidence that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition.

NCEN attacks this language as unconstitutionally vague. The FTC was of course not limited to prohibiting the precise misrepresentations that had occurred in the past. Here, as in *FTC* v. *Colgate-Palmolive Co., supra,* 380 U.S. at 393, 85 S.Ct. at 1047, the challenged language is "as specific as the circumstances will permit." In that case, the Court also stated,

> We think it reasonable for the Commission to frame its order broadly enough to prevent respondents from

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[*] Some of the advertisements carried this legend.

> engaging in similarly illegal practices in future advertisements. As we said in *Federal Trade Comm'n* v. *Ruberoid Co.*, 343 U.S. 470, 473 [72 S.Ct. 800, 96 L.Ed. 1081]: "[T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." Having been caught violating the Act, respondents "must expect some fencing in." *Federal Trade Comm'n* v. *National Lead Co.*, 352 U.S. 419, 431 [77 S.Ct. 502, 1 L.Ed.2d 438.]

380 U.S. at 395, 85 S.Ct. at 1048. The challenged provision is not unconstitutionally vague.

IV. *The Required Additional Statement*

The order also directs NCEN to include in any future advertisements or public statement it makes concerning the relationship between eating eggs and heart and circulatory disease, the further statement that many medical experts believe increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease. (Paragraph I, B.) NCEN argues that, even if its advertisements contained misrepresentations, this provision of the order exceeds that which is necessary to prevent repetition of the violation.

[8, 9] The First Amendment does not permit a remedy broader than that which is necessary to prevent deception, *Beneficial Corp.* v. *FTC*, *supra*, 542 F.2d at 619-620, or correct the effects of past deception, *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, 760 (D.C.Cir. 1977). In its present form, the challenged condition on the right to make an assertion that is not deceptive does not meet this test. Because the record here, unlike that in *Warner-Lambert Co.* v. *FTC*, *supra*, does not show a long history of deception which has so permeated the consumer mind that the "claim was believed by consumers after the false advertising had ceased" *id.*, at 771, we are concerned primarily with preventing future deception. The condition in its present form would require NCEN to argue the other

side of the controversy, thus interfering unnecessarily with the effective presentation of the pro-egg position. The desired preventive effect can be achieved by requiring the disclosure that there is a controversy among the experts and NCEN is presenting its side of that controversy. The additional statement in the form now ordered by the FTC should be required only when NCEN chooses to make a representation as to the state of the available evidence or information concerning the controversy. As thus modified, the challenged condition would not unnecessarily curtail NCEN's right to present its position.

If the provision requiring an additional statement is so modified by the FTC, it will be enforced. The rest of the order will be enforced in its present form.

ENFORCED IN PART.

SUPPLEMENTAL OPINION ON FTC'S MOTION TO AMEND JUDGMENT NUNC PRO TUNC

The FTC has moved that we amend the above opinion "by performing the modification of the portion of the Commission's order requiring affirmative disclosure of certain facts directed [in Part IV] of that opinion." A proposed form of order is submitted with the motion.[5] In response, petitioners oppose the motion, and also ask, in effect, that we reconsider other portions of our opinion.

Petitioners having omitted to file a petition for rehearing within the time allowed by Rule 40(a), Fed.R.App.P., we decline to entertain their request for reconsideration. Insofar as their arguments relate to their interpretation of Part IV of the opinion, they are without merit. It is true, as we said there, that this record does not show effects of the deceptive advertising on the consumer mind

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[5] In a footnote in its supporting memorandum, the FTC states that its motion is not a concession of the correctness of the modification and reserves the right to file a petition for certiorari on this question.

comparable to those in the *Warner-Lambert* case, and therefore "we are concerned *primarily* with preventing future deception" (emphasis supplied). The past cannot be totally ignored, however. Concrete evidence of past effects is likely to be difficult and expensive, if not impossible, to obtain in most deceptive advertising cases.[6] Even though such evidence is not present, the FTC is entitled to draw reasonable inferences as to the effects deceptive statements are likely to have had upon consumers. Although the weight we can give to these effects in the present case is limited by the absence of any findings by the FTC on the subject, we are at least entitled to assume that many persons interested in the egg-cholesterol question have read NCEN's advertisements, as it was intended they should, and that therefore enough taint remains to justify the limited corrective advertising order we have approved.[7]

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[6] See R. Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv.L.Rev. 661, 698 (1977):

> . . . Comparable proof of deception-perception-memory influence would be virtually impossible in most advertising cases.
>
> If the Commission is to do an effective job in regulating deceptive advertising, corrective advertising must apply to more than the one-in-a-million type of ad campaign present in *Warner-Lambert*.

(Footnote omitted.)

[7] See Judge J. Skelly Wright's statement in *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, 770 (D.C.Cir. 1977):

> . . . [W]hatever incremental chill is caused by a corrective advertising order beyond that which would result from a cease and desist order may well be necessary if the interest of consumers in truthful information is to be served at all. Otherwise, advertisers remain free to misrepresent their products to the public through false and deceptive claims, knowing full well that even if the FTC chooses to prosecute

The revised order the FTC now asks us to enter, which appears as an appendix hereto, carries out the directions contained in Part IV of our opinion. Inasmuch as that order is presumably the one that would be adopted by the FTC if the case were returned to it, there is no reason to delay the proceeding by a remand. Accordingly, the order entered by the FTC is modified to read as shown in the appendix and, as modified, is ordered enforced.

ENFORCE AS MODIFIED.

APPENDIX

The full text of the order of the Federal Trade Commission as modified, affirmed, and enforced by the Court is:

> It Is Ordered that respondents National Commission on Egg Nutrition and Richard Weiner, Inc., corporations, their successors and assigns, either jointly or individually, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of eggs for human consumption do forthwith cease and desist from:
>
> A. Disseminating or causing the dissemination of any advertisement by means of the United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

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[7] (Continued)

> they will be required only to cease an advertising campaign which by that point will, in all likelihood, have served its purpose by deceiving the public and already been replaced.

See also *Pitofsky, supra*, n. 6, at 692-693 and nn. 129-130, and Note, *"Corrective Advertising" Orders of the Federal Trade Commission*, 85 Harv.L.Rev. 477, 482-483 (1973), both of which Judge Wright cites in support of the quoted statement.

1. Represents that there is no scientific evidence that eating eggs increases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis or any attendant condition;

2. Represents that there is scientific evidence that dietary cholesterol, including that in eggs, decreases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis or any attendant condition;

3. Represents that the is scientific evidence that avoiding dietary cholesterol, including that in eggs, increases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition;

4. Represents that eating eggs does not increase the blood cholesterol level in a normal person;

5. Represents that the blood cholesterol level is prevented from being raised or lowered by dietary cholesterol intake;

6. Represents that the human body increases its manufacture of cholesterol in an amount equal to a decrease in dietary cholesterol intake;

7. Represents that the average human body eliminates the same amount of cholesterol as that eaten;

8. Represents that dietary cholesterol, including that in eggs, is needed by the body for building sex hormones, for transmitting nerve impulses and for maintaining life in cells; or

9. Utilizes the name "National Commission on Egg Nutrition" unless it is clearly and conspicuously disclosed in immediate conjunction with the name that the National Commission on Egg Nutrition is composed of egg producers and other individuals and organizations of, or relating to, the egg industry.

B. Disseminating, or causing the disemination, of any advertisement by means of the United States mails or by

any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition or

2. Makes any representation concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition

unless it is clearly and conspicuously disclosed in immediate conjunction therewith that there is a controversy among medical experts concerning the relationship of dietary cholesterol, including that in eggs, to heart disease, and that respondents are presenting their side of that controversy.

C. Disseminating, or causing the dissemination of, any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents that there exists, or describes, scientific evidence which supports the theory that consumption of dietary cholesterol, including that in eggs, does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition or

2. Makes any representation concerning the state of the available evidence or information concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition

unless it is clearly and conspicuously disclosed in immediate conjunction therewith that many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease.

D. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents as insignificant the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition, or represents that there is overwhelming scientific evidence or otherwise misrepresents the amount of scientific evidence that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis or any attendant condition.

2. Misrepresents in any manner the physiological effects of consuming dietary cholesterol or eggs.

STATUTORY PROVISIONS

Sections 5(a)(1) and (c), of the Federal Trade Commission Act, 15 USC §45(a)(1) and (c) provide respectively:

§ 45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

* * *

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides

or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, execept that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 at Title 28.

Section 12 of the Federal Trade Commission Act, 15 USC §52 provides:

§ 52. Dissemination of false advertisement—Unlawfulness

(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in or having an effect upon commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, or cosmetics.

Unfair or deceptive act or practice

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 45 of this title.

(Chicago *Sun Times*, January 9, 1975)

A BRITISH STUDY
HAS FOUND NO EVIDENCE
THAT EATING EGGS
IS RELATED TO A RISK OF
HEART ATTACK:

Cholesterol

"In certain animal species a diet rich in cholesterol induces the appearance of arterial lesions which have some similarity to those seen in human subjects, and comparative studies of different human populations show that those which have a diet rich in cholesterol have a higher death rate from I.H.D. However, a diet rich in cholesterol is usually one which is rich also in saturated fatty acids. Most of the dietary cholesterol in western communities is derived from eggs, *but we have found no evidence which relates the numbers of eggs consumed to a risk of I.H.D.*"• (emphasis ours)

DIET AND CORONARY HEART DISEASE, a Report of the Advisory Panel of the Committee on Medical Aspects of Food Policy (Nutrition) on Diet in relation to Cardiovascular and Cerebrovascular Disease. Issued by Britain's Department of Health and Social Security. An official British Government report, published in London in 1974, by a panel of Great Britain's most distinguished physicians, researchers and nutritionists.

THE AMERICAN PUBLIC TOO HAS
THE RIGHT TO THIS INFORMATION.

NATIONAL COMMISSION ON EGG NUTRITION
Park Ridge, Ill. 60068

• Ischaemic Heart Disease (coronary heart disease) is a cardiac disability (either acute or chronic) which arises from a reduction or an arrest of the blood supply to part of the heart muscle either by a narrowing of a blood vessel or by complete obstruction of it.

(Chicago *Daily News*, April 17, 1975)

ARE MEDICAL SCIENTISTS BARKING UP THE WRONG TREE BY ADVISING DIETARY CHANGES FOR AN ENTIRE POPULATION?

From the looks of things, we'd say they are.
For years, Americans have been told by the American Heart Association to reduce consumption of eggs. The reason, they say: dietary cholesterol,—found in eggs and all other foods of animal origin—clogs the arteries and brings on coronary heart disease. Avoid eggs, we're told, and you will live longer.

It appears America has bought this—tens of millions believe that eating eggs causes heart attack.

The problem with this is that neither the American Heart Association—despite the millions spent to foster the cult of the sacred cow of dietary manipulation—nor the American scientists who dutifully follow in its train have any proof that for 95% of all Americans, those in normal good health, eating eggs, meat or diary products causes heart attacks.

In fact, last summer, Dr. Richard Ross, American Heart Association President, admitted to a Senate subcommittee that they don't have any real evidence that cholesterol in the diet causes heart disease.

And at the same time, British Department of Health medical experts said:

> "Most of the dietary cholesterol in western communities is derived from eggs, *but we have found no evidence which relates the number of eggs consumed to a risk of I.H.D.*" (I.H.D. is coronary heart disease)

And we have stated publicly:

> "There Is No Scientific Proof That Eating Eggs Increases The Risk Of A Heart Attack."

The January 27, 1975 Journal of the American Medical Association reported that the Government has recently

spent over $40,000,000 of tax money in an attempt to prove that lowering cholesterol by drugs to approximately the degree possible by dietary manipulation reduces deaths or the number of subsequent attacks in men who already have had heart attacks. The result: lowering cholesterol did not reduce th' number of subsequent heart attacks.

If lowering cholesterol levels is ineffective in men who've had a heart attack (and thus are more susceptible to another), a logical conclusion would seem to be that it won't prove beneficial to normal, healthy persons.

In continuing attempts to find evidence of a causal link between dietary cholesterol and coronary heart disease, hundreds of millions of dollars have been and are now being spent by the Government, the American Heart Association and others.

Meanwhile, other research seeking the answer to what causes and what can prevent heart attacks is neglected. The big money is poured into ever larger and more expensive dietary experiments.

Why does the "in" group of doctors and scientists who control research grants refuse adequately to fund experiments to investigate suspected factors such as stress, soft water, trace element deficiencies, xanthene oxidase, lack of vigorous exercise, trans-fatty acids and vitamin accumulation?

There are lots of trees in the forest, and it looks like the cat may not be in the one where the dogs are barking.
Published in the public interest by

NATIONAL COMMISSION ON EGG NUTRITION
Park Ridge, Illinois 60068

(Chicago *Daily News*, April 8, 1975)

HAVE MEDICAL SCIENTISTS PAINTED THEMSELVES INTO A CORNER?

an editorial in the February issue of the respected American Journal of Cardiology asks.

WE THINK SO. Americans are being sold, and millions have bought, what is bad science and bad logic—the acceptance as a proved fact of what is only an hypothesis, i.e. that eating foods of animal origin—milk, meat and eggs, all of which contain cholesterol—causes coronary heart disease.

The authors of the editorial state:

> "Our meticulous study of that report (of the National Heart and Lung Institute) on arteriosclerosis suggests that scientists are laboring in research ruts . . ."
>
> • • •
>
> "Through the years we have become aware that segments of research information have often been pulled together prematurely and the population propagandized into believing that the problem of arteriosclerosis has been conquered."
>
> • • •
>
> "We are alarmed that some national health planners have indicated . . . that if a few simple rules for risk factor intervention (*for example, reduced consumption of eggs and other foods of animal origin*) are followed, a health problem that claims over one million Americans each year will disappear."

The authors conclude that if the multiple risk factor fails, the final results of which will not be known until 1980, fail to demonstrate the efficiency of risk factor intervention, American "health planners may be reduced to a state of scientific bankruptcy."

Back in 1973 we said:

"THERE IS NO SCIENTIFIC EVIDENCE THAT EATING EGGS INCREASES THE RISK OF A HEART ATTACK"

How did one segment of the medical profession react? The American Heart Association, its sacred cow of dietary manipulation threatened, convinced the Federal Trade Commission to bring suit to gag us lest we continue to challenge it with what we believe to be the truth.

That truth was forcefully stated by a panel of renowned British doctors and scientists who said:

> "Most of the dietary cholesterol in western communities is derived from eggs, but we have found no evidence which relates the number of eggs consumed to a risk of coronary heart disease.
>
> So far the Federal Court has refused the FTC's petition to gag us, but the Government, with hundreds of millions of taxpayers' money already spent to enshrine that sacred cow, continues its efforts to silence us.

It may be there'll be lots of company in that corner!

If you would like to know more about this, write us:

NATIONAL COMMISSION ON EGG NUTRITION
P.O. Box #692 Park Ridge, Illinois 60068

(Chicago *Tribune*, January 29, 1976)

THE NATIONAL COMMISSION ON EGG NUTRITION BELIEVES THE AMERICAN PEOPLE SHOULD HAVE THESE FACTS

Hundreds of millions of dollars, much of it government money, have been spent on research projects attempting to prove that lowering blood cholesterol through diet or drugs will reduce the risk of heart disease. The search has proven fruitless.

Here are three studies reported in 1975 which help clarify the question as to whether or not eliminating eggs from the diet will lessen the risk of heart disease.

1. At UCLA, Dr. Roslyn Alfin-Slater, and others, selected two groups of healthy, male subjects who normally ate eggs and whose serum cholesterol and blood pressure were in normal range. One group, 25 men whose age ranged from 20 to 28 years, were fed two eggs per day for eight weeks in addition to their usual cholesterol-containing diet. The other group, 27 men with an age range of 39 to 66 years, were fed one egg per day for four weeks, then two eggs every other day for four weeks. For two weeks after the eight-week feeding period, all eggs were removed from that diet. Serum cholesterol determinations were conducted on two successive weeks before the egg diets were given, weekly for eight weeks during the egg feeding, and thereafter on the egg-free diet. The results indicate that there were no significant differences in average serum cholesterol levels between any two time periods in either group. (Reported at the International Congress on Nutrition, Kyoto, Japan, August 8, 1975.)

2. In a Minnesota study, half of a group of 17,000 patients in state hospitals—where diets can be strictly controlled—ate a normal diet and the other half a diet lower in cholesterol. After 4½ years, researchers totaled the number of heart attacks, strokes, and other cardiovascular problems that affected people in each group. Dr. Ivan Frantz, of the University of Min-

nesota, who reported on the projects stated: "In the entire population . . . including men and women of all ages over 21, despite a satisfactory decrease in blood cholesterol, there was not the slightest hint of benefit." (Reported at the American Heart Association's annual Scientific Sessions, Anaheim, California, November 17, 1975.)

3. Dr. William Weidman, a Mayo Clinic researcher, reported on a three year study which involved more than 2,500 school children, from six to 16 years of age. Dr. Weidman stated: "There was no correlation between the level of cholesterol in the blood and the amount of cholesterol in the food they ate." This study was financed by a $2.1 million grant from the National Heart and Lung Institute, a Federal agency. (Reported at the American Heart Association's annual Scientific Sessions, Anaheim, California, November 18, 1975.)

FOR YOUR ADDITIONAL INFORMATION . . .

The Coronary Drug Project was started in 1966. It was funded by the National Heart and Lung Institute at a cost of $40 million. The purpose was to determine whether lowering blood cholesterol concentration through use of drugs could prevent heart disease. At the start, 8,300 men were involved, upon which five drugs were to be tested. Three of the drugs were discontinued early in the tests because of undesirable side effects. The other two drugs, clotibrats and niacin were administered to the end of the test. The controls received a placebo (a "blank" capsula or pill which has no effect.). Ciofibrate and niacin are the most widely used cholesterol-lowering drugs. The serum cholesterol of those receiving the drugs was lowered more than is usually accomplished through stringent diets. At the end of the eight-year project, neither group receiving the drugs had a significantly different rate of heart disease than the group receiving the placebo. (Reported in the January 27, 1975, issue of the *Journal of the American Medical Association*.)

NATIONAL COMMISSION ON EGG NUTRITION
205 Touhy Avenue
Park Ridge, Illinois 60068

(CANADIAN REPORT)

RECOMMENDATIONS FOR PREVENTION PROGRAMS IN RELATION TO NUTRITION AND CARDIOVASULAR DISEASE

Source: Recommendations of the Committee on Diet and Cardiovascular Disease, as amended and adopted by Department of National Health and Welfare, June, 1977.
Bureau of Nutritional Sciences,
Health Protection Branch,
Department of National Health and Welfare

RECOMMENDATIONS FOR PREVENTION PROGRAMS IN RELATION TO NUTRITION AND CARDIOVASCULAR DISEASE

The evidence concerning the relationship between diet and cardiovascular disease has been reviewed by a special expert Committee established in 1973. The Report of this Committee was presented to the Minister of National Health and Welfare for study. As a result, the background documentation was accepted but several of the recommendations were amended for feasibility in implementation.

Canadians enjoy one of the highest standards of living in the world and life expectancy from birth of 69.3 years for men and 76 for women, which is similar to that of other Western nations and higher than that of less industrialized nations. However, in Canada, 50% of all deaths are related to atherosclerosis. This condition occurs not only in old age, but also affects significant numbers of Canadians in middle age. About one third of all deaths among people under age 65 are attributed to atherosclerosis. The risk factors usually associated with cardiavascular disease (elevated blood lipids, high blood pressure,

smoking and diabetes) and those factors less closely associated (obesity, lack of physical fitness and immoderate alcohol consumption) suggest that cardiovascular disease is amendable to preventive action.

The dietary recommendations amended and adopted by the Department of National Health and Welfare, were designed to help in educating the public to select an appropriate diet, and thereby to take some responsibility for promoting personal health.

Canadians are advised to follow Canada's Food Guide and to avoid foods which provide calories without essential vitamins and minerals. They are advised also to practice moderation in the use of foods and beverages which tend to elevate blood fats. Evidence is mounting that dietary cholesterol may not be important to the great majority of people and that severe restrictions of cholesterol need only be applied to those genetically disposed toward hypercholesterolemia. Thus, a diet restricted in cholesterol would not be necessary for the general population. A recommendation to emphasize linoleic acid was adopted because linoleic acid is the polyunsaturated fatty acid which is involved in the control of serum cholesterol levels. Sources of dietary linoleic acid include salad and cooking oils made from safflower, sunflower, corn, cottonseed, soybean and peanut.

These recommendations should not be considered as a replacement for specific or therapeutic diets prescribed by a physician for treatment of a particular disease or condition. Rather, the recommendations are geared to preventive measures and programs for whole communties and populations.

GUIDELINE FOR FOLLOWING DIETARY RECOMMENDATIONS FOR PREVENTION PROGRAMS

Canadians should observe the following:

a) consume a nutritionally adequate diet, as outlined in Canada's Food Guide

b) avoid overweight through appropriate food selection and increased physical activity

c) limit the total amount of fat, sugar, salt and alcohol in the diet and increase the intake of linoleic acid

GUIDELINES

Follow Canada's Food Guide, noting:

—no more than 35% of total calories as fat, with increased intake of linoleic acid

—at least 50% of calories as carbohydrates, reducing the intake of sugar and replacing with starches

—a reduction in the intake of salt

To control calories

- limit intake of high caloric, high fat desserts such as pies, cookies, cakes and ice cream
- limit intake of high caloric snack foods such as potato chips, other deep-fried snacks, chocolate and other candies, and soft drinks
- limit intake of all forms of alcohol (spirits, wine and beer are high in calories). Do not use daily.

To control the amount and type of fat

- choose lean cuts of meat, trim off visible fat, discard fat which cooks out of meat and avoid gravy
- use fish or poultry at least four times a week for either of the two main meals
- avoid foods which are deep-fried

- use cooking methods which help to remove fat such as baking, broiling, boiling
- limit intake of cooking fats and oils and table fats; in any product replacement, choose high linoleic content polyunsaturated fats
- avoid excessive use of high fat dairy products such as cream, cream cheese, ice cream, and use those with a lower fat content such as skim or 2% milk, cottage cheese, and yoghurt

To control salt

- reduce intake of salty foods
- limit the use of salt in cooking and at the table

Note: The above recommendations do not apply to infants, or to patients on therapeutic diets. Growing persons, pregnant women, nursing mothers, elderly and infirm should be particularly careful in their selection of foods to include essential nutrients. In growing children, caloric intake should be sufficient to ensure adequate growth.

Supreme Court, U. S.
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No. 77-1551

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL COMMISSION ON EGG NUTRITION,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Argument

Pursuant to Supreme Court Rule 24(5), Petitioner National Commission on Egg Nutrition hereby advises the Court of *Metpath* v. *Imperato*, 450 F. Supp. 115 (S.D. N.Y. 1978) (S. App. 1-11) a decision not available at the time Petitioner filed its Petition for Writ of Certiorari.

In *Metpath* a municipal government contended that it could constitutionally prohibit accurate, non-deceptive informational statements about diet and heart disease when uttered in commercial advertisements by clinical laboratories. The text of the challenged advertisements included the statement that "the amount of a certain type of cholesterol, known as high density lipoprotein ("HDL"), in the blood is related to an individual's susceptibility to heart disease." (S. App. 2) Specifically, the advertisements asserted:

> "The encouraging thing about HDL is that it apparently protects people against heart disease" (S. App. 12).

and

> "This Eskimo is High on HDL . . . It's a type of cholesterol (high density lipoprotein) that apparently protects people from heart disease" (S. App. 12).

and

> "For once, a high level of something is good for you." (S. App. 12).

Relying on *Virginia State Board of Pharmacy* v. *Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976) and *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), the district court held that restraint of such truthful, non-deceptive speech on cholesterol and heart disease abridges First Amendment guarantees. (S. App. 10).

Metpath illustrates the very type of truthful, non-deceptive advertising commentary on the cholesterol heart disease question which, in the judgment of Petitioner and now of a district court, cannot be constitutionally restrained but which the present order would nonetheless prohibit.

See, e.g. illustration 6 in footnote 7 of Petition. *Metpath* therefore underscores the present order's unconstitutional overbreadth.

Moreover, inasmuch as the government insists that this is not a corrective advertising case (Brief in Opp. 9), *Metpath* cannot be distinguished on the grounds that *Metpath*-type discussion of cholesterol and heart disease would, unless qualified, mislead in the present case because of some lingering effect of Petitioner's past publications.

Conclusion

For the reasons given in the Petition and on the authority of *Metpath*, the writ of certiorari should issue.

Respectfully submitted,

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APPENDIX

SUPPLEMENTAL APPENDIX

METPATH INC., Plaintiff,

v.

Pascal IMPERATO, M.D., as Commissioner of the Department of Health of the City of New York and Chairman of the Board of Health of the City of New York, the Department of Health of the City of New York, and the Board of Health of the City of New York, Defendants.

No. 78 Civ. 1016 (JMC).
United States District Court,
S. D. New York.
April 17, 1978.

OPINION

CANNELLA, *District Judge.*

After a bench trial, advanced and consolidated with the hearing on plaintiff's application for a preliminary injunction, the Court declares unconstitutional New York City Health Code § 13.21(h) ["the regulation"] and enjoins defendants from enforcing the ban on advertising by clinical laboratories contained in that regulation.[1]

Jurisdiction is based upon the Civil Rights Act, 42 U.S.C. § 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343(3).

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[1] Pursuant to the New York City Charter, the New York City Health Code "shall have the force and effect of law." N.Y.City Charter § 558(a) (1977). The provisions of the City Health Code are enacted by the Board of Health of the New York City Department of Health and are more akin to "regulations" than to "statutes," the latter term implying legislative action. *See* N.Y.City Charter § 558(b), (c), (e), (f) (1977).

FACTS

The regulation challenged in this suit provides in full text:

> A clinical laboratory shall not advertise for patronage to the general public by means of bills, posters, circulars, letters, newspapers, magazines, directories, radio, television, or through any other medium.

N.Y.C. Health Code § 13.21(h) (1973).

Plaintiff Metpath Inc. ["Metpath"] is a New York corporation, with its principal place of business in New Jersey, and is a "clinical laboratory" within the meaning of the regulation. During January and February of 1978 Metpath sought permission from defendants to publish a certain advertisement[2] in a newspaper of general circulation within the City of New York. The text of the advertisement states that the amount of a certain type of cholesterol, known as high density lipoproteins ["HDL"], in the blood is related to an individual's susceptibility to heart disease. The advertisement also states that Metpath can perform a laboratory test to measure HDL levels in the blood and concludes with the statement: "And even though all laboratory tests must be ordered by a physician, we thought you should know something about us."[3]

Defendants responded to Metpath's inquiries that publication of the advertisement would be a violation of the

[2] Metpath actually sent defendants two slightly different proposed advertisements. Affidavit of Gary J. Cohan ¶ 10, at 6, *Metpath Inc.* v. *Imperato*, No. 78 Civ. 1016 (JMC) (S.D.N.Y., filed March 8, 1978). Both advertisements are included as Appendices A and B to this Opinion. The Court deems the differences in these advertisements immaterial to the resolution of this dispute.

[3] Appendix A; *see* note 2 *supra*.

regulation and could result in revocation of Metpath's clinical laboratory permit as well as criminal prosecution.[4]

Based upon defendants' negative response, Metpath commenced the instant suit, by order to show cause, seeking to declare the regulation unconstitutional. On consent of the parties, trial on the merits was advanced and consolidated with the hearing on Metpath's application for a preliminary injunction. Fed.R.Civ.P. 65(a)(2).

At a meeting of the New York City Board of Health held subsequent to the filing of this action, its members officially decided that Metpath's publication of the proposed advertisement, in a newspaper of general circulation within the City of New York, would violate the regulation.

DISCUSSION

[1] A series of recent Supreme Court opinions establishes beyond peradventure that "commercial" speech is entitled to the protections of the first amendment to the Constitution.[5] In the most recent of these opinions, Mr. Justice Blackmun, speaking for the Court, observed

> that our cases long have protected speech even though it is in the form of a paid advertisement; in a form that is sold for profit; or in the form of a solicitation to pay or contribute money. If commercial speech is

[4] *See* N.Y.Health Code §§ 3.07, 3.12, 13.33(a)(7) (1973); N.Y. City Charter § 558(d) (1977) ("Any violation of the health code shall be treated and punished as a misdemeanor. . . .").

[5] *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2591, 53 L.Ed.2d 810 (1977); *Linmark Associates* v. *Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

to be distinguished, it "must be distinguished by its content." But a consideration of competing interests reinforce[s] our view that such speech should not be withdrawn from protection merely because it propose[s] a mundane commercial transaction. Even though the speaker's interest is largely economic, the Court has protected such speech in certain contexts. The listener's interest is substantial; the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision-making.

Bates v. *State Bar of Arizona,* 433 U.S. 350, 363-64, 97 S.Ct. 2691, 2698, 53 L.Ed.2d 810 (1977) (citations omitted), *quoting Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 761, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

The task for the Court is to assess the public first amendment interest in the free flow of the information contained in Metpath's advertisement and to determine whether that interest is outweighed by the public interest allegedly served by the regulation. *Bigelow* v. *Virginia,* 421 U.S. 809, 826, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).[6]

[6] See, in this regard, the comments of Mr. Justice Black in *Time, Inc.* v. *Hill,* 385 U.S. 374, 400, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (Black & Douglas, JJ., concurring).

Both Metpath and the public have significant first amendment interests in the free flow of information concerning the relationship between heart disease and HDL levels in the blood. First, the Metpath advertisement contains information concerning scientific studies of "general public interest." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 764-65, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Second, Metpath's economic interest in advertising its services does not disqualify it from protection under the first amendment. *Id.* at 762-63, 96 S.Ct. 1817. Third, the free flow of information concerning the availability of services is essential to the individual economic decisions that form the basis of our free enterprise system. *Id.* at 765, 96 S.Ct. 1817. Finally, defendants have conceded for the purpose of this proceeding that the contents of Metpath's advertisement are factually accurate. [7]

Defendants argue that, since the regulation does not prohibit Metpath from advertising in medical or scientific journals, the regulation should be viewed as a restriction on the "time, place, or manner of speech." See *Linmark Associates* v. *Willingboro,* 431 U.S. 85, 93-94, 97 S.Ct. 1614, 1618, 52 L.Ed.2d 155 (1977). It is clear, however, that the regulation is not directed at the form of speech but rather at the identity of the listener: all advertising to the general public is proscribed. Similarly, Metpath's ability to communicate directly with physicians cannot be deemed an alternative method of communicating with the general public. Individuals who do not see a doctor would be deprived of the information entirely. Others would not receive the information until their next doctor visit and then, only if the physician chose to disclose it.

[7] Transcript of proceedings, at 14, *Metpath Inc.* v. *Imperato,* No. 78 Cic. 1016 (JMC) (S.D.N.Y., April 10, 1978) [hereinafter cited as "Hearing Transcript"].

There remains the task of determining whether these first amendment interests are outweighed by the public interest allegedly served by the regulation. Defendants argue that the evil the regulation seeks to prevent is

> the alluring promise of relief, the raising of false hopes, the persuading of a doctor to run a test which in his opinion is not needed, will not help [the doctor] diagnose the patient any more and won't tell him a darn thing different to do about how he should treat the patient.[8]

Citing Semler v. *Oregon State Board of Dental Examiners,* 294 U.S. 608, 612, 55 S.Ct. 570, 79 L.Ed. 1086 (1935), defendants contend that the regulation is a valid exercise of the state's police power.

Initially, the Court does not deem a legitimate public interest the protection of doctors from annoying inquiries by their patients. In any event, this alleged public interest is clearly outweighed by the interests protected by the first amendment.

Defendants' reliance on the forty-three year old Supreme Court opinion in *Semler, supra,* is misplaced, since the state's interest in insulating the public from "false hopes" is not at issue in this dispute. All concede that false, deceptive, or misleading advertising is not protected by the first amendment,[9] but defendants maintain that they may

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[8] Hearing Transcript, *supra* note 7, at 11.

[9] *See Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771-72, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Warner-Lambert Co.* v. *FTC,* 562 F.2d 749, 758-59 (D.C.Cir. 1977); N.Y.Gen. Business Law § 350 (McKinney 1968); N.Y.Penal Law § 190.20 (McKinney 1975).

legitimately prohibit clinical laboratories from disseminating completely accurate information to the general public.[10] Additionally, no first amendment claim was presented to the Court in *Semler,* and it is questionable whether the Court would reach the same result were the *Semler* case to be decided today.[11]

[2] Defendants next argue that Metpath's publication of the advertisement would constitute an attack on other provisions of the Health Code. These other regulations[12] provide that clinical laboratories may conduct tests only at the request of a licensed physician and that the results of such tests may be reported only to the doctor who authorized them.[13] The validity or wisdom of these restrictions is irrelevant to the instant dispute. Metpath dis-

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[10] *See* Hearing Transcript, *supra* note 7, at 14.

[11] *See* note 5 *supra.*

[12] N.Y.City Health Code § 13.21(b), (c) (1973).

[13] Throughout this proceeding the bulk of defendants' argument in support of the regulation has been based upon this provision of the Health Code. For example, a representative of defendant Board of Health interpreted Metpath's position as follows:

> It seems to me that Metpath is questioning the wisdom of the provision of the Health Code requiring a physician's order for a particular test and instead seems to claim that perhaps the average layman is competent enough to know whether he needs an HDL test and to request his physician to have such a test made. Clearly, the average layman is not competent to know what test should be done and the average layman is not competent to properly evaluate the results of such a test.

Affidavit of Bernard Davidow ¶ 11, at 6, *Metpath Inc.* v. *Imperato,* No. 78 Civ. 1016 (JMC) (S.D.N.Y., filed April 4, 1978).

claims any challenge to these other regulations[14] and in fact includes in its proposed advertisement that "all laboratory tests must be ordered by a physician."[15]

[3] Finally, in a somewhat related argument, defendants attempt to justify the regulation as follows:

> The interest served is to protect the health and the purse of the private citizen as well as the public treasury, by not permitting the clinical laboratories to determine what clinical tests to perform on a person and also to prevent unnecessary and useless tests that the clinical laboratory would perform in order to reap financial profits.[16]

Assuming, without deciding, that the state has a legitimate interest in determining the type of medical testing or treatment it will allow to be performed on its citizens, *cf. Rizzo* v. *United States,* 432 F.Supp. 356, 358 (E.D.N.Y. 1977) (Cosantino, J.), that interest is not advanced by the regulation challenged in this suit. A lifting of the advertising ban would neither permit "the clinical laboratories to determine what clinical tests to perform on a person" nor permit them to perform "unnecessary and useless tests." Defendants' regulatory scheme allows only licensed physicians to authorize clinical laboratory tests; if defendants believe "unnecessary and useless" tests are

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[14] *See* Complaint ¶ 9, at 4-5, *Metpath Inc.* v. *Imperato,* No. 78 Civ. 1016 (JMC) (S.D.N.Y., filed March 8, 1978); Affidavit of Charles H. Miller ¶ 10, at 6-7, *Metpath Inc.* v. *Imperato,* No. 78 Civ. 1016 (JMC) (E.D.N.Y., filed April 5, 1978).

[15] Appendix A; *see* note 2 *supra.*

[16] Defendants' Memorandum of Law, at 11, *Metpath Inc.* v. *Imperato,* No. 78 Civ. 1016 (JMC) (S.D.N.Y., filed April 4, 1978).

being performed, their quarrel lies with the medical profession, not with Metpath.[17]

Defendants raise the spectre of physicians deluged with patients demanding that their doctors authorize HDL tests —all as a result of advertisements such as that proffered by Metpath.[18] The fallacy in this argument was exposed by the Supreme Court:

> [T]he argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance.

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[17] In this regard, defendants have directed the Court's attention to a recent United States Senate Subcommittee Report. Senate Special Comm. on Aging, Subcomm. on Long-Term Care, Fraud and Abuse Among Clinical Laboratories, No. 94-944, 94th Cong., 2d Sess. (1976) ["Senate Report"]. The Senate Report details instances of widespread Medicaid fraud by clinical laboratories involving kickbacks to physicians and overpricing. After an intensive six-month investigation, *id.* at 47, the subcommittee did not recommend to the Congress any restrictions on advertising by clinical laboratories, *id.* at 49-50. More to the point, the Senate Report states that, according to Metpath's board chairman's testimony before the New Jersey Commission of Investigations in 1975, the company's New Jersey Medicaid revenues made up only a small part of its business because Metpath refused to participate in kickback arrangements. *Id.* at 38, 47.

[18] Not only are these arguments irrelevant to the question before the Court but they also call into question whether defendants' loyalty lies with the interests of the medical profession or with the interests of the people of the City of New York.

Bates v. *State Bar of Arizona*, 433 U.S. 350, 374-75, 97 S.Ct. 2691, 2704, 53 L.Ed.2d 810 (1977). Nor does this Court denigrate Metpath's desire to "reap financial profits" as such motivation is the basis of our free enterprise economy.

CONCLUSION

In sum, the public interest allegedly served by this regulation causes no perceptible movement when placed in the scales opposite the public interest served by the first amendment to the Constitution. Consequently, the regulation challenged in this suit is unconstitutional on its face.

The Court is aware that new problems may result from an invalidation of defendants' ban on advertising to the general public. Most dangers will be alleviated, however, by the state's power to proscribe false, deceptive, or misleading advertising.[19] And, the clinical laboratory industry's instinct for self-preservation will encourage it to monitor closely its public advertising so as to maintain its protection under the Constitution. Defendants can no doubt be counted on for vigilance in punishing any overstepping. As to other potential problems, the suppression of information, in order to avoid its misuse, is a choice not open to defendants or to the Court: "It is precisely this kind of choice . . . that the First Amendment makes for us." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, 770, 96 S.Ct. 1817, 1829, 48 L.Ed.2d 346 (1976).

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[19] *See Bates* v. *State Bar of Arizona*, 433 U.S. 350, 383-84, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); N.Y.Gen. Business Law § 350 (McKinney 1968); N.Y.Penal Law § 190.20 (McKinney 1975).

Accordingly, the Clerk of the Court is directed to enter judgment declaring New York City Health Code § 13.21(h) unconstitutional and enjoining defendants from enforcing the prohibition against advertising to the public by clinical laboratories, as contained in that regulation.

Upon request of defendants, operation of the judgment is stayed, provided a prompt appeal is taken.[20]

The foregoing are the Court's findings of fact and conclusions of law. Fed.R.Civ.P. 52(a).

SO ORDERED.

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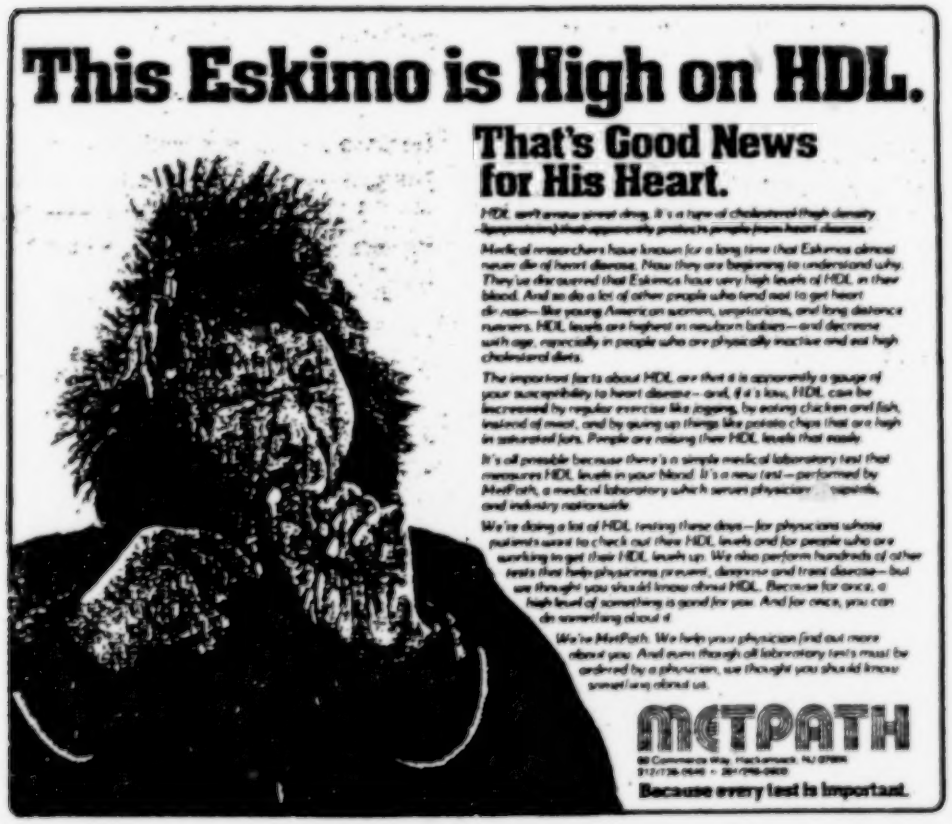
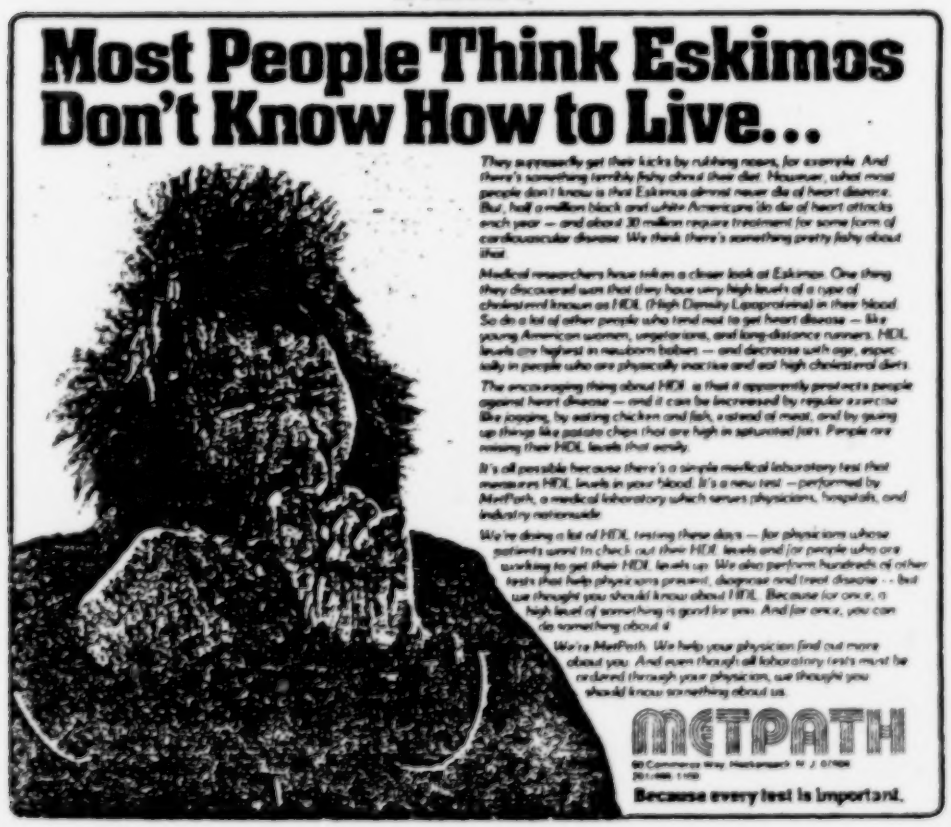
[20] [Stay vacated. Appeal voluntarily discontinued by stipulation and order, *Metpath Inc.* v. *Imperato*, 78 Civ. 1016 (JMC) (Filed May 18, 1978).]


This Eskimo is High on HDL.
That's Good News for His Heart.
HDL isn't some street drug. It's a type of cholesterol (high density lipoproteins) that apparently protects people from heart disease.
Medical researchers have known for a long time that Eskimos almost never die of heart disease. Now they are beginning to understand why. They've discovered that Eskimos have very high levels of HDL in their blood. And so do a lot of other people who tend not to get heart disease—like young American women, vegetarians, and long distance runners. HDL levels are highest in newborn babies—and decrease with age, especially in people who are physically inactive and eat high cholesterol diets.
The important fact about HDL is that it is apparently a gauge of your susceptibility to heart disease—and, if it's low, HDL can be increased by regular exercise like jogging, by eating chicken and fish, instead of meat, and by giving up things like potato chips that are high in saturated fats. People are raising their HDL levels that easily.
It's all possible because there's a simple medical laboratory test that measures HDL levels in your blood. It's a new test—performed by MetPath, a medical laboratory which serves physicians, hospitals, and industry nationwide.
We're doing a lot of HDL testing these days—for physicians whose patients want to check out their HDL levels and for people who are working to get their HDL levels up. We also perform hundreds of other tests that help physicians prevent, diagnose and treat disease—but we thought you should know about HDL. Because for once, a high level of something is good for you. And for once, you can do something about it.
We're MetPath. We help your physician find out more about you. And even though all laboratory tests must be ordered by a physician, we thought you should know something about us.
METPATH
Because every test is important.

APPENDIX B


Most People Think Eskimos Don't Know How to Live...
They supposedly get their kicks by rubbing noses, for example. And there's something terribly fishy about their diet. However, what most people don't know is that Eskimos almost never die of heart disease. But, half a million black and white Americans do die of heart attacks each year — and about 30 million require treatment for some form of cardiovascular disease. We think there's something pretty fishy about that.
Medical researchers have taken a closer look at Eskimos. One thing they discovered was that they have very high levels of a type of cholesterol known as HDL (High Density Lipoproteins) in their blood. So do a lot of other people who tend not to get heart disease — like young American women, vegetarians, and long-distance runners. HDL levels are highest in newborn babies — and decrease with age, especially in people who are physically inactive and eat high cholesterol diets.
The encouraging thing about HDL is that it apparently protects people against heart disease — and it can be increased by regular exercise like jogging, by eating chicken and fish, instead of meat, and by giving up things like potato chips that are high in saturated fats. People are raising their HDL levels that easily.
It's all possible because there's a simple medical laboratory test that measures HDL levels in your blood. It's a new test — performed by MetPath, a medical laboratory which serves physicians, hospitals, and industry nationwide.
We're doing a lot of HDL testing these days — for physicians whose patients want to check out their HDL levels and for people who are working to get their HDL levels up. We also perform hundreds of other tests that help physicians prevent, diagnose and treat disease — but we thought you should know about HDL. Because for once, a high level of something is good for you. And for once, you can do something about it.
We're MetPath. We help your physician find out more about you. And even though all laboratory tests must be ordered through your physician, we thought you should know something about us.
METPATH
Because every test is important.

Supreme Court, U. S.
FILED
JUL 7 1978
MICHAEL RODAK, JR., CLERK

No. 77-1551

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL COMMISSION ON EGG NUTRITION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion (Pet. App. 47a-63a) and supplemental opinion (Pet. App. 63a-68a) of the court of appeals are reported at 570 F. 2d 157. The decision and order of the Federal Trade Commission (Pet. App. 1a-46a) are reported at 88 F.T.C. 174.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1977, and was amended on January 23, 1978. On February 17, 1978, Mr. Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 28, 1978. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Federal Trade Commission ordered petitioner, when it makes certain representations concerning the relationship between dietary cholesterol and heart disease, to disclose additional information concerning the controversy among medical experts on the matter. The Commission also ordered petitioner to cease and desist from making certain other representations on the matter. The questions presented are:

1. Whether substantial evidence supports the Commission's determination that the disclosure of additional information is necessary to prevent petitioner's representations from being misleading.

2. Whether the Commission's order is unconstitutionally vague.

STATEMENT

Petitioner is a private, not-for-profit corporation composed of representatives of various egg producers. Petitioner and Richard Weiner, Inc., an advertising agency,[1] caused paid advertisements for eggs to be disseminated in commerce. These advertisements had as their predominant theme a statement that "there is absolutely no scientific evidence that eating eggs, even in quantity, will increase the risk of a heart attack" (Pet. App. 22a). This representation was accompanied by statements that, *e.g.*, there is "overwhelming evidence to the contrary" or "preliminary evidence that the opposite is true" (*id.* at 22a, 27a n. 15). In August 1974 the Commission issued an administrative complaint against petitioner, alleging that these and other representations

[1]Petitioner states (Pet. 3 n. 1) that its "petition is also filed on behalf of Richard Weiner, Inc." Weiner does not appear in the caption of the petition, and petitioner's counsel does not indicate that he is appearing as counsel for Weiner (Pet. 28).

were materially misleading and therefore violated Sections 5 (38 Stat. 719, as amended) and 12 (as added, 52 Stat. 114, and amended) of the Federal Trade Commission Act, 15 U.S.C. 45, 52.[2]

Hearings were held before an administrative law judge, who rendered an initial decision sustaining the allegations of the complaint. The administrative law judge found that there was a substantial body of scientific studies supporting the hypothesis that the ingestion of cholesterol (of which eggs are a major source) is positively related to the incidence of heart disease (the "diet/heart disease" hypothesis), and that those studies "were conducted using scientific methodologies, were performed by competent and highly regarded investigators, have been reported in recognized scientific journals after peer review, and have been generally accepted by experts in the field and by the scientific community" (Pet. App. 11a). In view of those studies the administrative law judge found that petitioner's principal representation—that there is no scientific evidence that eating eggs increases the risk of heart disease—is false and misleading (Pet. App. 9a). The judge also found that petitioner made other false and misleading representations to bolster its message that eating eggs, even in quantity, is not harmful and is in fact positively beneficial (Pet. App. 21a-24a).[3] The administrative law judge recommended the

[2]The Commission applied to a district court under Section 13(a) of the Act, as added, 52 Stat. 114,15 U.S.C. 53(a), for a temporary injunction restraining dissemination of petitioner's advertisements pending completion of the administrative proceeding. The district court denied the injunction, but the court of appeals reversed and directed entry of the injunction. 517 F. 2d 485. This Court denied the petition for a writ of certiorari. 426 U.S. 919.

[3]These included representations that dietary cholesterol is needed by the body for building sex hormones, for transmitting nerve impulses, and for maintaining life in cells; that there is scientific evidence that

entry of an order prohibiting petitioner from making certain representations concerning the relationship between eating eggs and heart disease.

The Commission affirmed the findings of the administrative law judge and, with certain modifications,[4] adopted his recommended order. The Commission recognized that there is some disagreement among scientists about the diet/heart disease hypothesis and stated that it did not intend to choose between the opposing sides (Pet. App. 12a). But it agreed with the administrative law judge that it was "misleading in the extreme" for petitioner to represent that there "is no evidence" to support the hypothesis when in fact there was substantial evidence supporting that hypothesis (Pet. App. 13a).

The court of appeals upheld the Commission's findings and, after modifying it in certain respects, enforced the Commission's orders.[5] The order as modified by the

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avoiding consumption of eggs would increase the risk of heart disease; and that "eating eggs does not increase the blood cholesterol in a normal person" (Pet. App. 21a-23a). Petitioner does not challenge the proscriptions in the order which unqualifiedly forbid the making of these and similar claims.

[4]The administrative law judge recommended that petitioner be prohibited from making any representation tha' eating eggs does not increase the risk of heart disease unless it could demonstrate a "reasonable basis," consisting of competent and reliable scientific studies, supporting the representation (see Pet. App. 28a). Although there is authority supporting that approach (see, *e.g.*, *National Dynamics Corp.* v. *Federal Trade Commission*, 492 F. 2d 1333 (C.A. 2), certiorari denied, 419 U.S. 993), the Commission believed that a less restrictive remedy—permitting such representations as long as they were appropriately qualified—was appropriate in this case and would better accommodate the First Amendment interests in permitting petitioner to present its side of the controversy to the public (Pet. App. 39a).

[5]Petitioner's pr[illegible] argument before the Commission and the court of appeals was that its representations— that there is no scientific evidence supporting the diet/heart disease hypothesis—should not be

court of appeals consists of four parts (Pet. App. 65a-68a). Part A orders petitioner to cease and desist from making certain specific representations, including the representation that there is no scientific evidence that eating eggs increases the risk of heart disease and the representation that dietary cholesterol is needed for building sex hormones, transmitting nerve impulses, and maintaining life in cells.

Part B orders petitioner to cease and desist from advertising "that eating eggs does not increase the risk of heart attacks, heart disease, [etc.]" or from making "any representation concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks, heart disease, [etc.] * * * *unless* it is clearly and conspicuously disclosed * * * that there is a controversy among medical experts concerning the relationship of dietary cholesterol, including that in eggs, to heart disease, and that [petitioner is] presenting [its] side of the controversy" (Pet. App. 67a).

Part C orders petitioner to cease and desist from making representations in advertising concerning the evidence for or against the diet/heart disease hypothesis "*unless* it is clearly and conspicuously disclosed * * * * that many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease" (*ibid.*).

Part D orders petitioner to cease and desist from advertising that the evidence supporting the diet/heart

---

interpreted literally, but should be interpreted as simply an expression of petitioner's opinion that the existing evidence does not support the hypothesis (see Pet. App. 12a-20a). The Commission rejected that argument as contrary to the common and reasonable understanding of the term "scientific evidence" (*ibid.*), and the court of appeals agreed, stating that "our own finding, if it were our province to make one, would be less charitable to petitioners than that of the FTC" (Pet. App. 56a). Petitioner does not reiterate that argument here.

disease hypothesis is insignificant, that the evidence on the other side is overwhelming, "or otherwise misrepresent[ing] the amount of scientific evidence" on the question (*id.* at 68a).[6]

ARGUMENT

The decision of the court of appeals presents no issue warranting this Court's review. Although petitioner contends (Pet. 10) that there is a conflict between the decision below and *Beneficial Corp.* v. *Federal Trade Commission*, 542 F. 2d 611 (C.A. 3), certiorari denied, 430 U.S. 983, the court of appeals cited and relied on *Beneficial*

[6]The court of appeals' modification of the Commission's order affected Parts B and C of the order. The Commission's order (Pet. App. 44a-45a) had prohibited petitioner from making any representation concerning the relationship (or nonrelationship) of dietary cholesterol to heart disease unless it also disclosed (as Part C of the court's order now requires) that "many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease" (*id.* at 67a). The court of appeals believed that the required qualification would be unnecessarily broad in cases where petitioner did not directly comment on the state of the evidence but merely expressed a view that eating eggs does not increase the risk of heart disease (Pet. App. 66a-68a). The court believed that the statement now required by Part B of the order would be adequate to dispel the deception implicit in a simple representation that eating eggs does not increase the risk of heart disease. Relying on *Beneficial Corp.* v. *Federal Trade Commission*, 542 F. 2d 611 (C.A. 3), certiorari denied, 430 U.S. 983, the court held that the foregoing modification of the Commission's order was warranted by First Amendment principles requiring that a remedy not be broader than necessary to prevent the deception (Pet. App. 62a-63a). The court, however, upheld the Commission's "many medical experts believe" qualification in cases where petitioner comments specifically on the state of the scientific evidence. See Part C of the order (Pet. App. 67a).

The court's initial opinion left it to the Commission to modify its order (Pet. App. 63a). The Commission then submitted a revised order to the court and moved that it be enforced, and the court enforced the revised order (Pet. App. 63a-65a).

(Pet. App. 56a, 62a). In any event, the court and the Commission correctly applied prevailing principles to the facts of this case.

1. Petitioner does not challenge Part A of the court's order. It contends (Pet. 12-18) that Parts B and C are overbroad because they require petitioner to make qualifying statements that petitioner claims are not necessary in all cases to make its representations non-misleading. Petitioner concedes that the Commission may condition the utterance of a misleading statement "upon the making of some appropriate additional statement without which [the original statement] will mislead" (Pet. 12),[7] but it argues that the additional statements required by Parts B and C are not necessary in all cases to prevent the unqualified representations from being misleading. This case therefore presents, according to petitioner, the question whether the Commission may require "truthful, nonmisleading commercial speech" (Pet. 9) to include statements about the views of persons with whom petitioner does not agree.

The case simply does not present such a question. The Commission found, and the court of appeals agreed, that petitioner's representations *are* misleading unless accompanied by additional information, and that finding was reasonably based on substantial evidence in the record. In view of the substantial body of medical evidence and opinion supporting the hypothesis that there is a positive correlation between the intake of dietary cholesterol and heart disease—which petitioner does not dispute—it was

[7]Thus petitioner recognizes that the First Amendment does not prohibit the government from regulating commercial advertising to ensure its truth and to prevent deception. See, *e.g.*, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 n. 24; *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 69 n. 31 (plurality opinion). That principle is not at issue here.

reasonable for the court and the Commission to conclude that any advertised statement concerning the relationship between dietary cholesterol and heart disease would be misleading in the absence of the qualification that there existed a controversy on the subject. The fact that the statement may be true in itself (*e.g.*, "Dr. X, Nobel Prize winner, stated today that eating eggs poses no risk of heart disease") is not significant in these circumstances; the Commission reasonably concluded that an unqualified statement on the merits of the cholesterol issue, or selective citations of authority supporting petitioner's side of the issue, tends to create the misleading impression that there is no significant controversy on the matter.[8] Similarly, the Commission and the court of appeals reasonably concluded that representations concerning the state of the evidence on the issue (*e.g.*, "10 recent studies have concluded that eating eggs poses no risk of heart disease") have the tendency to create a false impression unless qualified by a disclosure of the fact, established by the record, that many experts believe the evidence indicates otherwise.

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[8]See the Commission's statement at Pet. App. 36-37a: "[W]hen an advertiser, (or a 'National Commission on Egg Nutrition') which presumably knows everything there is to know about the product being discussed, assures the public that product is safe * * * the public will, and we think has a right to, assume that the advertiser is doing more than expressing an opinion that would at best obtain the qualified assent of a mere fraction of those professionally competent to evaluate it."

Petitioner errs in contending (Pet. 15-18) that the qualifying statements required by Parts B and C of the court's order are "corrective advertising" that may be sustained only on the basis of a finding that previous advertising had created a perseverent misimpression among the public on the merits of an issue. See *Warner-Lambert Co.* v. *Federal Trade Commission*, 562 F. 2d 749 (C.A. D.C.), certiorari denied, April 3, 1978 (Nos. 77-855 and 77-1118), where the Commission required Warner-Lambert to make a corrective statement whenever it advertised Listerine in order "to correct a widely held, mistaken belief which was cultivated by [Warner-Lambert's] past advertising." 562 F. 2d at 759 n. 52. Unlike the corrective statement required in *Warner-Lambert*, the qualifying statements required by Parts B and C of the court's order here are not designed to correct a mistaken belief cultivated by petitioner's past advertising, and they are not required whenever petitioner advertises eggs. Rather they are required only when petitioner makes certain specific representations, and they are required because they are necessary to prevent the deception that the Commission found would result from advertising those representations in the future without such qualifications. As such, they are the kind of qualifying statements that petitioner recognizes to be appriopriate and lawful when a representation without such qualifications would be misleading.[9]

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[9]The court of appeals' supplemental opinion stated that it is reasonable to assume that petitioner's past misleading advertising has some continuing effect among consumers (Pet. App. 64a), but the

2. Petitioner also contends (Pet. 18-21) that the qualifying statement required by Part C is unconstitutional because it allegedly "forces Petitioner to express an anti-egg position on the merits of the diet heart disease controversy" (Pet. 18).[10] That assertion is incorrect. The order permits petitioner to state any position on the merits of the controversy and to cite any studies to support that position, so long as it avoids making the statements prohibited by Part A of the order (which petitioner does not challenge).[11] That it also requires petitioner to disclose the fact, well established by the record, that many medical experts view the existing evidence differently does not force petitioner "to express an anti-egg position" or "utter an opinion it believes to be false" (Pet. 18, 20). Affirmative disclosure concerning controverted medical facts is quite appropriate. Petitioner cannot avoid its obligation to disclose information necessary to prevent deception simply by asserting that it disagrees with the thing to be disclosed. *J. B. Williams Co.* v. *Federal Trade Commission*, 381 F. 2d 884 (C.A. 6); *Ward Laboratories, Inc.* v. *Federal Trade Commission*, 276 F. 2d 952 (C.A. 2),

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court reiterated that "we are concerned *primarily* with preventing future deception" (Pet. App. 62a, 64a; emphasis by the court). Although the court was correct in stating that it is reasonable to assume some continuing effects from past advertising, and in observing that "[t]he past cannot be totally ignored" (Pet. App. 64a), petitioner is wrong in asserting that the "sole justification" (Pet. 15) for the decision here is the need to correct a misimpression created by past advertising.

[10]Petitioner calls this and its other arguments "overbreadth challenges" (*e.g.*, Pet. 12, 18, 21). This Court, however, has held that the "overbreadth doctrine" does not apply to commercial speech. *Ohralik* v. *Ohio State Bar Association*, No. 76-1650, decided May 30, 1978, slip op. 14-15 n. 20; *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 380-381.

[11]Indeed, the very reason the Commission modified the more restrictive prohibitions recommended by the administrative law judge was to permit petitioner to express its views on the merits of the controversy and to cite evidence supporting those views. See Pet. App. 39a and note 4, *supra*.

certiorari denied, 364 U.S. 827. If petitioner were right, any advertiser could frustrate the Commission simply by insisting on the position that its original statements were not misleading.

3. Petitioner's argument (Pet. 21-27) that the order is impermissibly vague is insubstanial. Petitioner's argument appears to be based primarily on the complaint that the Commission and the court of appeals failed to declare whether numerous hypothetical representations would come within the terms of the order or particular parts of it (see Pet. 22-27). Such declaratory advice is not the function of a cease and desist order; it is sufficient if the terms are clear enough "to avoid raising serious questions as to their meaning and application" (*Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 367-368) and "are as specific as the circumstances will permit" (*Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 393). Moreover, as this Court stated in *Colgate-Palmolive*, *supra*, 380 U.S. at 394, if petitioner is "sincerely unable to determine whether a proposed course of action would violate the present order, [it] can, by complying with the Commission's rules, oblige the Commission to give [it] definitive advice as to whether their proposed action, if pursued, would constitute compliance with the order" (footnote omitted). See 16 C.F.R. 3.61(d). See also *National Society of Professional Engineers* v. *United States*, No. 76-1767, decided April 25, 1978, slip op. 17-19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1978.

DOJ-1978-06